(1)

Supreme Court, U.S.
FILED

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No. _____

In The
Supreme Court of The United States

JERRY MCMEANS,
Petitioner,

v.

ANTHONY J. BRIGANO, WARDEN,
Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI
with Appendix

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February, 2001

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182 pp

QUESTIONS PRESENTED FOR REVIEW

QUESTION ONE

WHETHER THE SIXTH CIRCUIT EXTENDING THIS COURT'S RULING IN *MARTINEZ V. COURT OF APPEALS OF CALIFORNIA*, TO BAR PRO SE FILINGS IN THE STATE COURT OF APPEALS CONFLICTS WITH THE HOLDING IN *ANDERS V. CALIFORNIA.*

QUESTION TWO

WHETHER THE SIXTH CIRCUIT'S APPLICATION OF *MARTINEZ V. COURT OF APPEALS OF CALIFORNIA* AND THE SIXTH CIRCUIT'S INTERPRETATION OF OHIO APPELLATE PROCEDURE SERVE AS COUNSEL FOR PROCEDURAL DEFAULT.

LIST OF PARTIES TO THE PROCEEDING IN THE COURT BELOW

The Petitioner, Jerry McMeans, was the Defendant in the Ohio State Court of Common Pleas and Appellant in the Ohio Appellate Court, the habeas Petitioner in the United States District Court for the Southern District of Ohio and the Appellant in the Sixth Circuit Court of Appeals.

Respondent, who was the Respondent/Defendant in the United States District Court for the Southern District of Ohio and the Appellee in the Sixth Circuit Court of Appeals, is Warden, Anthony Brigano.

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2. Opinion, Sixth Circuit Court of Appeals, *McMeans v. Brigano*, 98-4096, filed 10/5/00 B

3. Opinion and Order, *McMeans v. Brigano*, 97-CV-54, filed 6/11/98 C

4. Decision, *State of Ohio v. Jerry McMeans*, Case No. 89AP1037 filed 11/24/92 E

5. Journal Entry, *State of Ohio v. Jerry McMeans*, Case No. 89AP1037 filed 2/7/90 F

JURISDICTIONAL STATEMENT

This Court's jurisdiction is timely being invoked under 28 U.S.C. § 1254. Petitioner asserts the deprivation of rights secured by the United States Constitution and 28 U.S.C. §§ 2241-2254. The District Court possessed jurisdiction pursuant to 28 U.S.C. § 2241. The Court of appeals possessed jurisdiction pursuant to 28 U.S.C. §§ 1291, 2253.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved is Ohio Appellate Rule 26 (B).

STATEMENT OF THE CASE

1. Basis for federal jurisdiction in the court of first instance.

The United States District Court for the Southern District of Ohio was vested with jurisdiction over this matter pursuant to 28 U.S.C. §2254 because Petitioner was a state prisoner alleging his unconstitutional detention.

2. Facts of Case.

A Franklin County Grand Jury indicted McMeans charging him with six (6) counts of Rape alleging his step-daughter, Wendy Self, as the victim. Following a jury trial, McMeans was convicted of five (5) counts of Rape (one count was dismissed by the trial court). He received three (3) consecutive life terms and two concurrent life terms of imprisonment.

The Ohio State Public Defender was appointed to represent McMeans on appeal. During the pendency of the appeal, McMeans sought leave to file a pro-se supplemental brief. (G-1). In his brief, McMeans argued his trial counsel's ineffective representation in a number of areas including the discovery violations which occurred during trial. The State Appellate Court struck the pro se brief. (F-1)

On August 23, 1990, the Tenth District Court of Appeals affirmed McMeans convictions.

McMeans filed a pro-se "Memorandum in Support of Jurisdiction" with the Ohio Supreme Court in November of 1990. The Supreme Court declined to accept the case.

McMeans continued to assert the legal errors in Ohio courts and in a Petition for Writ of Habeas Corpus in Federal District Court. While the Petition was pending in the District Court, the Ohio Supreme Court issued a ruling in *State v. Murnahan*, 63 Ohio St. 3d 60, 584 N.E.2d 1204 (1992) which for the first time gave litigants an avenue to pursue issues not raised due to ineffective assistance of appellate counsel. Pursuant to *Murnahan*, McMeans sought leave to withdraw his Petition in order to follow the required procedure. The District Court granted this request.

Within two weeks, McMeans filed a "Delayed Appeal" with the Tenth District Court of Appeals. (F-2) McMeans presented three claims which should have been raised on direct appeal by his appointed attorney. appellate counsel was ineffective for not presenting issues of the discovery violation, a confrontation violation and trial counsel's ineffective representation.. The State Court of Appeals reviewed the claims but denied the relief

sought. (E-1) McMeans then appealed to the Ohio Supreme Court who declined to accept jurisdiction.

McMeans then filed a Petition for Writ of Habeas Corpus in the United States District Court in Columbus, Ohio. The matter was consolidated with the previous filing and transferred to the District Court in Cincinnati pursuant to a request by Respondent.

At Respondent's urging, the Petition was dismissed without prejudice and McMeans was directed to pursue state post-conviction relief which Respondent argued was still available to him on two issues. McMeans filed a Post-Conviction Petition with the trial court which was then dismissed. The dismissal was unsuccessfully appealed to the Tenth District Court of Appeals. McMeans then filed a Memorandum in Support of Jurisdiction with the Ohio Supreme Court which declined to accept the case.

McMeans then pursued another state remedy before filing a Petition for Writ of Habeas Corpus on January 21, 1997 that is the subject of this action. On June 11, 1998, the District Court issued an order dismissing the Petition. McMeans then filed a timely notice of appeal and Petition for Certificate of Appealability which was granted on four issues; Ineffective Assistance of Trial Counsel, Biased Jury Composition, Discovery

violations and Confrontation violation.

On October 5, 2000 the Sixth Circuit Court of Appeals issued a 2-1 decision affirming the District Court. A Petition for Rehearing En Banc was denied November 30, 2000. This action ensued.

REASONS FOR GRANTING THE WRIT

QUESTION ONE

The errors began when McMeans' lawyer allowed the mother of a rape victim and father of a murder victim to sit on his jury without the use of one peremptory challenge. The errors continued into the trial when after Ms. Self testified it was revealed but not tendered that she had made other allegations of sexual assaults by other men.

> "THE COURT: I know that your office is busy, I know that you have a lot of cases. You have got to realize that this is a life sentence. This is probably next to murder, the most severe case we have down here, and you are treating it with an attitude that you don't give a shit if it gets reversed on appeal... you have to have researched the case. I know you have talked to the officers, I hope you know when a rule 16 comes up, you can say here it is, yes, I know exactly what's in that file. You don't know what in the file." (J-1)

Well let me tell you, there is a lot in this file..." (J-1)(emphasis added)

"...There is a report in here that she charged somebody you don't know about the other one." (J-1).

THE COURT: "what was withheld" (from defense counsel)

PROSECUTOR: I'm not quite sure. I would have to ask her out there" (Social Worker)

THE COURT: You don't know what she gave him and what she didn't?" (J-2)

Beginning with his first appeal of right and every level of review, McMeans sought to obtain relief and examination of his "Brady" claim and other errors.

McMeans repeatedly asked his court appointed attorney to raise the discovery violation as an issue on appeal.

After counsel refused to brief the issue, McMeans filed a pro se supplemental brief arguing the issue. The 10th District Court of Appeals struck the brief and instructed McMeans to either proceed pro-se or allow his appointed counsel to select the issues to raise. (F-1)

In affirming the District Court's Opinion, the Sixth Circuit found *Martinez v. Court of Appeal of California*,

528 U.S. 152, 120 S.Ct. 684 (2000), "clearly...contradicts the petitioner's assertion that there exists a constitutional entitlement to submit a pro se appellate brief on direct appeal in addition to the brief submitted by appointed counsel." This is not the holding of *Martinez*.

This Court, in *Martinez*, while holding an appellant has no constitutional right to self-representation on appeal, did not extend its ruling to preclude pro se filings. Instead, the right to do so was specifically protected in the opinion.

> "... the rules governing appeals in California, and presumably those in other States as well,[1] seem to protect the ability of indigent litigants to make pro se filing. See, e.g., *People v. Wende*, 25 Cal.3d 436, 440, 600 P.2d 1071, 1074, 158 Cal.Rptr. 839 (1979); see also *Anders v. California*, 386 U.S. 738, 18 L.Ed.2d 493, 87 S.Ct. 1396 (1967)."

Martinez at page 103, 120 S.Ct. 684 at 692.

The Sixth Circuit's ruling in McMean's case improperly extends *Martinez* beyond this Court's stated holding, and further, conflicts with this Court's ruling in *Anders, supra*. According to *Anders*, an indigent litigant is

[1] Ohio has recognized and allowed pro se supplemental briefs on appeal to include issues appellate counsel had declined to raise. See, e.g., *State v. Crawford*, 690 N.E.2d 910 (1996); *State v. Fryer*, 627 N.E.2d 1065 (1993); *State v. Matthews*, COA 13-96-23 (unreported)(3rd Dist. 1996).

permitted to raise any issue he wishes after receiving *appellate* counsel's notification of his intent to withdraw. In addition to reviewing specifically the issues raised by the indigent litigant, the reviewing court conducts a thorough examination for any other issues of merit.

Martinez recognizes an indigent appellant will continue to have the ability to raise issues not identified by appointed counsel. *supra.* To hold otherwise would place McMeans, where the Sixth Circuit has placed him, in a position inferior to an indigent appellant with qualified counsel who has been unable to find any issue of merit. A reviewing court will thoroughly review the entire record in the former case but refuse to consider a pro se issue properly filed in the latter. McMeans is afforded less due process of law simply because his appointed counsel identified an issue but failed to raise another, even though McMeans instructed him to do so.[2]

This is an unintended result and clearly not the intended ruling in *Martinez.*

Anders put into place a procedure by which an indigent litigant's access to the appellate courts would be protected after a determination was made of the merits by

[2] Counsel cannot refuse to raise a meritorious claim against the known wishes of his client, especially a claim preserved by objection. See, e.g, *Clay v. Director*, 74 F.2d 427 (7th Cir. 1984); *Clemons v. Delo*, 124 F.3d 944 (8th Cir. 1997).

appointed counsel. *Martinez* embraces *Anders*, reinforces that holding and does not provide support for the ruling by the Sixth Circuit on this issue. Certiorari should be granted on this issue.

QUESTION TWO

In its decision in McMeans' case, the Sixth Circuit held the primary claims of constitutional errors appointed counsel failed to raise in the direct appeal were not "exhausted" nor "fairly presented" to the Ohio courts in accordance with the "Exhaustion Doctrine". The result of this ruling leaves McMeans with no state forum in which to raise these claims. Under Ohio law, a motion pursuant to Rule 26 (B) is the only forum available to raise ineffective assistance of appellate counsel or the underlying primary constitutional claims. The Sixth Circuit did not address this lack of state forum, which would excuse the lack of exhaustion under 28 U.S.C. §§2254(b)(1)(B)(i) & (ii).

Before 1992, Ohio courts refused to allow an attack on appellate counsel in state habeas petitions. *Manning v Alexander*, 50 Ohio St.3d 127, 553 N.E.2d 264 (1990). Further, ineffective assistance of appellate counsel is not a claim which is cognizable in post-conviction proceedings pursuant to Ohio law. *State v. Murnahan*, 63 Ohio St.3d 60, 65, 584 N.E.2d 1204, 1208 (1992).

Murnahan set forth the manner in which issues relating to the direct appeal but which were omitted could be presented for review. A delayed motion for reconsideration should be filed with the court of appeals pursuant to Ohio Appellate Rule 26 setting forth the issues which serve as the basis for a claim of ineffective assistance of appellate counsel. This ruling was later codified as Ohio Appellate Rule 26 (B) setting forth a 90 day time limitation to file such a motion. (I-1)

The Doctrine of "exhaustion of state remedies" requires the federal habeas petitioner to adequately present his claim to the state courts before seeking relief from a federal court. *Rose v Lundy*, 455 U.S. 509 (1982). It is here the interpretation of Ohio rules and procedures by the Sixth Circuit effectively prevents McMeans, and those similarly situated, from ever complying with this requirement. McMeans has no post-conviction opportunity to raise a particular claim given the Sixth Circuit's reading of Ohio appellate procedure. Such an application in this case results in a suspension of the great writ. *Felker v. Turpin*, 518 U.S. 651 (1996).

Originally adopted by this Court in 1886 in *Ex Parte Royall*, 117 U.S. 241 (1886), the Exhaustion requirement was eventually codified and as modified by

AEDPA as set forth in 28 U.S.C. §§2254(b)(c) provides:

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that-

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exists that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

To prevent a dismissal for failure to exhaust state remedies, a petitioner must demonstrate he afforded the state court an opportunity to rule on the claim. *Vasquez v. Hillery*, 474 U.S. 254 (1986). The ruling of the Sixth Circuit in McMeans' case creates an "absence of corrective process" 28 U.S.C.A. §2254(b)(1)(B).

Appointed counsel did brief a confrontation issue regarding the restriction on cross-examination. After the trial court intimated evidence existed, the complaining witness had made sexual misconduct allegations against others, he denied McMeans the right to cross-examine on those issues.

> THE COURT: Now Mr. Janes would also like the opportunity to cross-examine the victim on her prior rape reports she gave, for purposes of testing her credibility. And I have advised Mr. Janes that I will not permit that, but I know that he wanted to proffer that into the record. Is that correct?
>
> MR. JANES: Yes Your Honor. (J-1)

Appointed counsel also briefed an issue regarding the trial attorney's ineffectiveness. McMeans had asked the issue include jury selection by trial counsel. However, appointed counsel refused to brief this issue.

McMeans, after conferring with his court appointed

appellate lawyer, begged him to raise additional issues of constitutional merit. Issues regarding discovery violations and jury selection were lacking in appointed counsel's brief. After being rejected, McMeans sought to supplement the brief filed with these issues. (G-1) The pro-se brief was rejected without consideration.

McMeans had been convicted prior to the decision in *Murnahan*. During his habeas proceedings, *Murnahan* was decided by the Ohio Supreme Court. McMeans then requested dismissal of his petition without prejudice in order to seek out a remedy in the newly created state forum. McMeans filed a Delayed Motion to Reconsider (F-2). He raised three primary claims as the basis of appellate counsel's ineffectiveness, the failure to raise; trial counsel's ineffectiveness, discovery violations and a Confrontation claim. In the entry denying McMeans' motion, the state Court of Appeals ruled on the merits of each claim. (E-1)

The Sixth Circuit held, only claims of ineffective assistance of appellate counsel can be addressed in an Application to Reopen pursuant to Ohio App. Rule 26 (B). It further ruled the issues which serve as the basis for the claim are not fairly presented and thus procedurally defaulted.

However, issues of merit stemming from the record in the trial of a case can not be properly brought in a post-conviction or state habeas action. Each would be dismissed as being barred by Res Judicata. The only available manner permitted to raise these issues is direct appeal.

The delayed application for reconsideration had been found to be a continuation of "activities related to the direct appeal itself." *White v. Schotten*, 201 F.3d 743, 752, (6th Cir. 2000), *cert. denied, Bagley v. White*, 121 S.Ct. 332 (2000). See also *Carpenter v. Mohr*, 163 F.3d 938, 944 (6th Cir. 1998) rev'd on other grounds *Edwards v. Carpenter*, 529 U.S. 446, 120 S.Ct. 1587 (2000)(both addressing on the merits the underlying claims of ineffective assistance of appellate counsel raised in the respective 26(B) proceedings, and not holding the claims to be procedurally defaulted).

The application of the rule requires a review of the merits of assigned error. The claims are sub issues of ineffective assistance. A 26 (B) proceeding can best be compared to a federal §2255 raising ineffective appellate counsel. See *United States v. Cook*, 45 F.3d 388, 394-95 (10th Cir. 1995); *Ratcliff v. United States*, 999 F.2d 1023 (6th Cir. 1993). It is the underlying constitutional errors appellate counsel failed to raise which are at issue.

No court reviewing such a claim can make a determination of the ineffective counsel claim without reviewing the constitutional errors counsel failed to identify and raise in the direct appeal.

The Ninth Circuit has determined the claim of ineffective counsel encompassed the federal claim of an involuntary plea. *Chacon v. Wood*, 36 F.3d 1459 (9th Cir. 1994). When reviewing the claim of ineffective assistance of appellate counsel, the merits of the underlying claim is determined. *See Banks v. Reynolds*, 54 F.3d 1508 (10th Cir. 1995). An objective reading of the ruling on McMeans' motion for delayed reconsideration shows the underlying claims of the ineffective assistance issue were reviewed and addressed. (E-1) Where the state court could not have addressed the claims without implicitly ruling on the claims that were raised in federal habeas, the claims are exhausted. *Lufkins v. Solem*, 716 F.2d 532,536 (8th Cir. 1983), *cert denied* 467 U.S. 1219 (1984); *Veala v. Estelle*,708 F.2d 954, 960 (5th Cir. 1983), cert. denied 464 U.S. 1053 (1984).

The claims were fairly presented and were the underlying claims of ineffective counsel and thus cognizable for review. Claims underlying counsel's ineffectiveness are exhausted and not defaulted. *Carpenter*, *supra*.

The Sixth Circuit held raising the claim as the basis for the ineffective assistance of appellate counsel issue did not require the state court to review the claims. (B-28) This was contrary to the holding by the state appellate court and the law.

The discovery claim was presented in a pro-se supplement to appointed counsel's brief on direct appeal. This followed counsel's refusal to raise the issue. The Sixth Circuit cited the holding in *Martinez v. Court of Appeals of California*, 528 U.S. 152, 120 S.Ct. 684 (2000) and held McMeans had no right to present such a brief. It equated the supplemental brief with an assertion of self-representation. This is an improper application of *Martinez*.

In refusing to raise McMeans requested issues, appellate counsel was in effect opining the issues were frivolous. If this were true of McMeans' entire appeal, he would be afforded the opportunity of a full review of his case by the appellate court pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396 (1967). If in counsel's opinion there were no issues which would "arguably support his appeal", the "indigent is given the opportunity to raise **any** point he chooses and the court proceed, after a full examination of all the proceedings...."

Anders at 744.

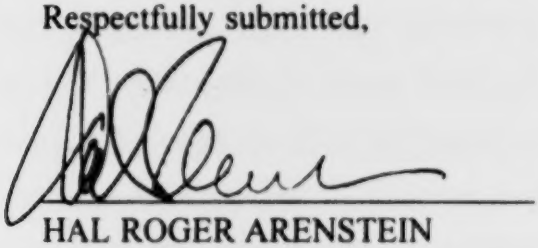
At this juncture, an indigent appellant who has been advised there are no issues worthy of review is afforded the opportunity to present any issue and have the entire record reviewed by the court while McMeans, indigent, is refused any consideration of issues presented pro-se.

The combined rulings of the Sixth Circuit as discussed above together with Ohio law, which prevents consideration of direct appellate issues in post-conviction or state habeas, precludes exhaustion of the issues. In addition, the Ohio Supreme Court will not consider an issue not raised in the appellate court. As a result, a litigant is left without a vehicle by which to raise meritorious issues neglected by his/her appointed appellate attorney. This presents an "inadequate state corrective process" as was condemned in *Young v. Ragen*, 337 U.S. 235 (1949) and serves as "cause' for procedural default. 28 U.S.C. §2254(b)(1)(B)(ii). Certiorari should be granted on this issue.

CONCLUSION

Petitioner hereby respectfully requests that this Court exercise its discretionary jurisdiction and grant the Petition for Writ of Certiorari as to the questions presented herein.

Respectfully submitted,



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98-4096

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
NOV 3 0 2000
LEONARD GREEN, Clerk

JERRY MCMEANS,	)	
	)	
Petitioner-Appellant,	)	
	)	**ORDER**
v.	)	
	)	
ANTHONY J. BRIGANO, WARDEN,	)	
	)	
Respondent-Appellee.	)	

BEFORE: RYAN, SILER, and CLAY, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and

decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

1ST CASE of Level 1 printed in FULL format.

JERRY MCMEANS,
Petitioner-Appellant,
v.
ANTHONY J. BRIGANO, Warden,
Respondent-Appellee.

No. 98-4096

UNITED STATES COURT OF APPEALS FOR THE SIXTH COURT

2000 U.S. App. LEXIS 24884; 2000 FED App. 0353P (6th Cir.)

June 23, 2000, Argued
October 5, 2000, Decided
October 5, 2000, Filed

PRIOR HISTORY: [*1] Appeal from the United States District Court for the Southern District of Ohio at Cincinnati. No. 97-00054. Sandra S. Deckwith.

DISPOSITION: AFFIRMED.

CASE SUMMARY

PROCEDURAL POSTURE: Petitioner prisoner appealed the order of the United States District Court for the

Southern District of Ohio dismissing his habeas corpus petition.

OVERVIEW: At petitioner's trial for raping his stepdaughter, the prosecution revealed that the victim had accused others of sexual assault, but the judge excluded the information from evidence. On appeal of dismissal of petitioner's habeas corpus petition, the court affirmed, finding three of his claims were procedurally defaulted, and that he was not prejudiced by alleged ineffective assistance of trial counsel in not excluding allegedly biased jurors. Petitioner's claim he was denied his constitutional right to confront his accuser with her subsequent accusations was not fairly presented to state courts, and appellate counsel's failure to raise this claim did not excuse the procedural default. Neither appellate counsel's failure to argue that disclosure of the victim's accusations was untimely nor his failure to assert the unsubstantiated juror bias claim was a denial of effective counsel.

OUTCOME: Order dismissing habeas corpus petition was affirmed. Petitioner's habeas corpus claims of denial of right to confront one's accusers and of ineffective assistance of counsel, relating to prosecution's revealing that accuser had accused others of sexual assault, were procedurally barred.

CORE TERMS: procedural default, rape, direct appeal, accusations, ineffective assistance, juror bias, pro se, Sixth Amendment, prior rape, juror, defaulted, exculpatory evidence, habeas petition, in camera, biased, federal habeas, postconviction, untimely, prosecution failed, disclose, default, appointed counsel, asserting, objectively unreasonable, jurisdiction to review, disclosure, fair trial, constitutional right, failing to raise

CORE CONCEPTS -

Criminal Law & Procedure: Habeas Corpus:
Procedural Default

If a petitioner seeking habeas corpus relief has committed procedural default in state courts on the claims he is presenting, the federal courts do not have jurisdiction, absent a showing of "cause" and "prejudice" to consider those claims.

Criminal Law & Procedure: Habeas Corpus:
Exhaustion of Remedies

The federal courts do not have jurisdiction to consider a claim in a habeas corpus petition that was not "fairly presented" to the state courts. A claim may only be considered "fairly presented" if the petitioner asserted both the factual and legal basis for his claim to the state courts.

Criminal Law & Procedure: Habeas Corpus:
Exhaustion of Remedies

There are four actions a defendant can take which are significant to the determination whether a claim has been "fairly presented" in state court in order for there to be jurisdiction for a federal court to consider a claim in a habeas corpus petition: (1) reliance upon federal cases employing constitutional analysis; (2) reliance upon state cases employing federal constitutional analysis; (3) phrasing the claim in terms of constitutional law or in terms sufficiently particular to allege a denial of a specific constitutional right; or (4) alleging facts well within the mainstream of constitutional law. General allegations of the denial of rights to a "fair trial" and "due process" do not "fairly present" claims that specific constitutional rights were violated.

Criminal Law & Procedure: Habeas Corpus:
Procedural Default

If the last state court to be presented with a particular federal claim reaches the merits, it removes any bar to federal-court habeas corpus review that might otherwise have been available. However, this is riot an invitation to the federal courts to seize upon mistakes by state courts to review procedurally defaulted claims.

Criminal Law & Procedure: Counsel: Effective Assistance: Appeals Criminal Law & Procedure: Habeas Corpus: Procedural Default

In order to succeed on a claim of ineffective assistance of appellate counsel, a petitioner must show errors so serious that counsel was scarcely functioning as counsel at all and that those errors undermine the reliability of the defendant's convictions. Strategic choices by counsel, while riot necessarily those a federal judge in hindsight might make, do not rise to the level of a U.S. Const. amend. VI violation. Not just any deficiency in counsel's performance is sufficient to excuse procedural default; the assistance must have been so ineffective as to violate the United States Constitution.

Criminal Law & Procedure: Discovery & Inspection: Brady Materials Constitutional Law: Procedural Due Process: Scope of Protection

In state criminal proceedings, the prosecution is obligated under the Due Process Clause of U.S. Const. amend. XIV to disclose evidence that is favorable to the accused and material to guilt or punishment. Evidence is "material" if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Where a state protects the confidentiality of records prepared by child protection agencies, defense counsel has no right to inspect those

records. Instead, it is sufficient for the trial judge to inspect the records in camera and disclose any exculpatory evidence contained therein. Generally, exculpatory evidence must be produced by the prosecution in time for effective use at trial.

Constitutional Law: Criminal Process:
Assistance of Counsel Criminal Law & Procedure: Counsel:
Right to Counsel: Postconviction Appeals
A defendant has no constitutional right to represent himself on direct appeal.

Criminal Law & Procedure: Habeas Corpus:
Cognizable Issues
Pursuant to 28 U.S.C.S. @ 2254(d)(1), – federal habeas corpus review of legal issues decided in state court is limited to deciding whether the state court decision was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States.

Criminal Law & Procedure: Habeas Corpus:
Cognizable Issues
For purposes of 28 U.S.C.S. @ 2254(d)(1), a state-court decision is contrary to the United States Supreme Court's precedent if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law

or if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to that of the Supreme Court.

Criminal Law & Procedure: Habeas Corpus:
Cognizable Issues

For purposes of 28 U.S.C.S. @ 2254(d)(1), a state-court decision involves an unreasonable application of the United States Supreme Court's precedent if the state court identifies the correct governing legal rule from the Supreme Court's cases but unreasonably applies it to the facts of the particular state prisoner's case, or if the state court either unreasonably extends a legal principle from Supreme Court precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply. The state court's decision cannot be contradicted under the unreasonable application prong of @ 2254(d)(1) unless that court's decision is "objectively unreasonable."

Constitutional Law: Criminal Process: Impartial Jury

Under U.S. Const. amend. VI, a state defendant is entitled to be tried by an impartial jury. A defendant maintaining juror bias must be afforded on opportunity to prove actual bias.

Civil Procedure: Preclusion & Effect of Judgments: Judicial Estoppel

The doctrine of judicial estoppel forbids a party from taking a position inconsistent with one successfully and unequivocally asserted by that same party in an earlier proceeding.

Criminal Law & Procedure: Counsel: Effective Assistance: Trials

To establish a claim for ineffective assistance of counsel, a defendant must show that his counsel's performance was constitutionally deficient and that counsel's deficient performance was prejudicial. If an alleged error was not "prejudicial," a federal court need not determine whether counsel's performance was constitutionally deficient.

COUNSEL ARGUED:

William R. Gallagher, Cincinnati, Ohio, for Appellant.

Stuart W. Harris, OFFICE OF THE ATTORNEY GENERAL, Columbus, Ohio, for Appellee.

ON BRIEF:

William R. Gallagher, Cincinnati, Ohio, for Appellant.

Todd R. Marti, OFFICE OF THE ATTORNEY GENERAL, Columbus, Ohio, for Appellee.

JUDGES: Before: **RYAN, SILER, and CLAY** Circuit Judges, RYAN J., delivered the opinion of the court, in which SILER, J., joined. CLAY, J. (pp. 22-25), delivered a separate opinion concurring in part and dissenting in part.

OPINION BY: RYAN

RYAN, Circuit Judge. Before us is the appeal from the district court's order dismissing the habeas petition of Jerry McMeans, an Ohio prisoner convicted of raping his stepdaughter. McMeans asserts that the district court erred when it held that he had procedurally defaulted on his Confrontation Clause, Brady, and juror bias claims. He also argues that the district court erred when it held that the Ohio court "reasonably applied" federal law in deciding that trial counsel rendered constitutionally adequate assistance. We will affirm.

I.

During the latter half of the 1980s, McMeans lived with his wife, Twila, and her children from a previous marriage, Donald Jr., Jerry, Misty, and Wendy. According to Wendy, one night in the summer of 1987, Wendy's intoxicated mother summoned her upstairs to a bedroom and ordered her to have sexual intercourse with her stepfather, an order Wendy allegedly followed. Wendy also

asserted that after this initial encounter McMeans forced her to have sexual intercourse with him or perform fellatio on him several more times, sometimes for money. McMeans denies having had any sexual relationship with Wendy.

At some point during this period, Wendy informed her father, Donald Self, of McMeans's alleged sexual misconduct. Donald contacted Wendy's mother and she allegedly assured him that the problem would not persist. Wendy later informed Donald that McMeans's alleged misbehavior continued and, soon thereafter, Donald sought the assistance of Franklin County Children Services (FCCS). At about the same time, Wendy also informed her fifth grade teacher of McMeans's alleged abuse. Wendy's teacher reported Wendy's allegations to FCCS.

After receiving these reports, FCCS took Wendy into its custody. At approximately the same time, McMeans lost his job and was evicted from his home in Columbus, Ohio. He then moved with his wife and the remainder of his adopted family to Wisconsin.

After a Franklin County grand jury charged McMeans with six counts of rape, Ohio authorities eventually located him in Wisconsin and procured his return to face criminal charges.

McMeans alleges that during voir dire it became apparent that two prospective jurors would be biased. According to McMeans, juror Hunt was the mother of a rape victim and juror Grey's daughter had been murdered.

McMeans also asserts that Grey was friends with the "chief county prosecutor." McMeans claims that, despite his personal objections to these jurors, his trial counsel did not employ unused peremptory challenges to remove Hunt and Grey. There is no record support for McMeans's assertions, however, because his trial counsel waived the right to have voir dire proceedings transcribed.

At trial, Wendy testified that McMeans had raped her several times and McMeans denied those charges. The theory of McMeans's defense was that Wendy had fabricated a story of sexual abuse in order that her father would gain physical custody of her. Aside from the testimony of Wendy and McMeans, several other witnesses testified that Wendy had informed them of McMeans's alleged misbehavior.

The only physical evidence presented at trial was the testimony of a doctor from FCCS who had examined Wendy. That doctor testified that Wendy had scarring and "irregularities" on her hymen, which possibly indicated sexual activity.

On the second day of trial, the prosecution gave the trial judge portions of reports from FCCS for in camera review. The reports noted that Wendy had accused two other men of sexually assaulting her after the petitioner's alleged abuse. After reviewing the file, the trial judge informed McMeans's counsel of Wendy's subsequent rape accusations, but warned counsel that he did not think such

evidence was admissible under Ohio law. The following day, when McMeans's counsel attempted to question Wendy and her father about the subsequent rape accusations, the trial judge ruled that such examination was impermissible under the Ohio rape shield law.

After the trial judge dismissed one of the counts against McMeans, the jury found McMeans guilty of the five remaining counts. The trial judge sentenced McMeans to five life sentences.

McMeans timely appealed his conviction with the assistance of appointed counsel. Counsel argued:

(1)] THE TRIAL COURT ERRED IN ADMITTING ... EVIDENCE ... OF PRIOR BAD ACTS ...

[(2)] THE TRIAL COURT ERRED BY EXCLUDING EVIDENCE OF PROSECUTRIX'S PRIOR ACCUSATIONS OF RAPE AGAINST OTHERS IN VIOLATION OF APPELLANT'S RIGHT TO A FAIR TRIAL, AND TO DUE PROCESS OF LAW AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION.

[(3)] THE TRIAL COURT ERRED BY OVERRULING APPELLANT'S MOTION TO DISMISS [THE CHARGES

AGAINST HIM WHICH WERE IMPERMISSIBLY VAGUE].

[(4)] APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION.

After submitting those arguments, McMeans filed a supplemental brief, pro se, which asserted, among other claims, that the prosecution failed to comply with the duties recognized by the Supreme Court in *Brady v. Maryland*, 373 U.S. 83 (1963). On February 21, 1989, the Ohio Court of Appeals struck McMeans's brief, noting that he had the option of dismissing his appointed counsel and relying upon his pro se brief. McMeans did not dismiss his appointed counsel.

The Ohio Court of Appeals affirmed McMeans's conviction on August 23, 1990. As to McMeans's contention that trial counsel should have been allowed to pursue inquiry into Wendy's prior rape accusations, the appellate court stated:

> This court finds that the [Ohio] rape shield law is not applicable to this case since the evidence concerning whether or not Wendy fabricated other

> rape charges does not address any aspect of her sexual activity. The evidence merely addresses whether or not Wendy is a credible witness. However, before a trial court may admit evidence that the victim had made prior accusations of rape against others, the trial court must be satisfied that the prior accusations were, in fact, false. ...
>
> In this case, there is no evidence in the record that Wendy's prior accusations were false. ... Had appellant wished to proffer evidence of the falsity of the prior accusations, appellant could have availed himself of an in-camera hearing . ... Since appellant did not, this court cannot find that the trial court abused its discretion in declining to permit appellant's counsel to cross-examine Wendy on her prior accusations of rape. Accordingly, appellant's second assignment of error is not well-taken.

Regarding McMeans's ineffective assistance claim, the court held that "none of the things appellant asserts as ineffective in and of themselves demonstrates ineffectiveness on the face of the record and, most certainly, do not demonstrate that the result would have been different." McMeans filed a motion for reconsideration of that decision, which the court of appeals denied on November 6, 1990.

McMeans then filed a pro se appeal to the Ohio Supreme Court, claiming four errors in his trial including the claim that his rights guaranteed by the Confrontation Clause had been violated. The Ohio Supreme Court declined to hear the appeal.

While his direct appeal was pending, McMeans filed a pro se motion for a new trial, arguing ineffective assistance of trial counsel and that the prosecution failed to fulfill its *Brady* obligations. After the Ohio Court of Appeals affirmed his conviction, the trial court rejected McMeans's motion, holding that such motion was untimely and, timing aside, that his arguments had been considered and rejected at the appellate level.

McMeans unsuccessfully appealed the trial court's decision. The Ohio Court of Appeals affirmed, ruling that McMeans's motion was untimely. McMeans then appealed to the Ohio Supreme Court, which declined to exercise its jurisdiction over his appeal.

In November 1991, McMeans filed his first habeas petition in federal court, arguing that the prosecution failed to disclose exculpatory evidence and that his Confrontation Clause rights had been violated. While his petition was pending, the Ohio Supreme Court ruled in *State v. Murnahan*, 584 N.E.2d 1204 (Ohio 1992), that an ineffective assistance of appellate counsel claim could be raised in a delayed motion for reconsideration of a direct appeal. Given this ruling, McMeans moved to dismiss his

petition without prejudice in order that he might file a *Murnahan* motion. The district court granted this request.

McMeans then submitted his *Murnahan* motion and argued that his appellate counsel grossly erred in failing to raise his Confrontation Clause, *Brady*, and juror bias claims. The Ohio Court of Appeals ruled, first, that the decision not to raise the juror bias claim was likely "appellate strategy" and the court was not prepared to gainsay that tactical decision. As to McMeans's argument that appellate counsel should have presented a *Brady* claim, that court stated:

> The trial court in this case reviewed the childrens' [sic] services file and disclosed the appropriate information to both parties. It was as a result of this in camera inspection that appellant became aware of the information he now asserts was not properly provided to him. ...

This court has previously addressed the issue of the prior rape reports and found that the trial court did not err in excluding this evidence from the trial. ... As a result, this court cannot find that appellate counsel was ineffective in failing to raise the issues appellant now raises as assignments of error in his previous appeal.

Finally, the appellate court ruled that appellate counsel had, in fact, raised a Confrontation Clause claim in

McMeans's direct appeal and that claim had been rejected. McMeans appealed that decision to the Ohio Supreme Court which, for a third time, declined to hear his case.

In August 1993, McMeans filed his second federal habeas petition. The district court dismissed McMeans's petition without prejudice after the respondent argued that McMeans should be required to seek relief under Ohio's postconviction procedure. When the respondent presented its argument in support of dismissal, it noted that if McMeans chose to file an Ohio postconviction motion, respondent would argue that McMeans had procedurally defaulted on his constitutional claims.

In April 1995, McMeans, acting pro se, requested postconviction relief from the Ohio courts. Ohio Rev. Code Ann. 2953.21. In that motion, McMeans argued that his appointed trial counsel provided constitutionally ineffective assistance by failing to remove the two allegedly biased jurors. The trial court denied McMeans's motion, stating: "[T]rial counsel's decision not to exclude these jurors could have been based upon other favorable answers that these jurors gave. Even barring that, this claim should have been raised on appeal and is now res judicata." The Ohio Court of Appeals affirmed. The Supreme Court of Ohio declined to hear McMeans's appeal.

In March 1996, McMeans, still acting pro se, filed a "delayed motion for a new trial based on newly discovered evidence," arguing that Ohio denied him his

Sixth Amendment right to be tried by an impartial jury. The trial court denied this motion, ruling that the evidence presented by McMeans did not demonstrate the necessity of a new trial. The Ohio Court of Appeals affirmed.

On January 21, 1997, McMeans, now represented by counsel, filed his third federal habeas petition. He argued that juror bias denied him a fair trial, that trial and appellate counsel provided ineffective assistance, that the prosecution failed to turn over exculpatory evidence in a timely manner, and that the limitation on cross-examination of Wendy Self violated rights guaranteed by the Confrontation Clause.

The district court dismissed the petition. That court ruled that McMeans had procedurally defaulted on his *Brady* and juror bias claims. The court then held that McMeans failed to demonstrate ineffective assistance of appellate counsel, which could serve as "cause" to review those claims. As to McMeans's ineffective assistance of trial counsel claim, the district court ruled that "[t]he state court decision rejecting petitioner's claim of ineffective assistance of trial counsel was neither contrary to nor unreasonable in light of clearly established federal law." Finally, the district court ruled that McMeans had not "fairly presented" the Confrontation Clause issue to the Ohio courts.

McMeans filed a notice of appeal and a petition for certificate of appealability. This court certified his ineffective assistance of trial counsel, biased juror, *Brady*, and Confrontation Clause claims.

II.

With each issue presented by the petitioner, the critical question is whether he committed procedural default in the Ohio courts on the claims or the particular arguments he presents. If that is the case, the federal courts do not have jurisdiction, absent a showing of "cause" and "prejudice" to consider those claims. *Murray v. Carrier*, 477 U.S. 478, 485 (1986).

A.

In his first assignment of error, the petitioner claims he was denied his constitutional right to confront his accuser with her subsequent rape accusations. The district court held that it could not consider the merits of this claim because the petitioner failed to "fairly present" it to the Ohio courts. We hold that the district court did not err.

The federal courts do not have jurisdiction to consider a claim in a habeas petition that was not "fairly presented" to the state courts. *Franklin v. Rose*, 811 F.2d 322, 324-25 (6th Cir. 1987). A claim may only be considered "fairly presented" if the petitioner asserted both the factual and legal basis for his claim to the state courts. *Id.* at 325. This court has noted four actions a defendant can take which are significant to the determination whether a claim has been "fairly presented": (1) reliance upon federal

cases employing constitutional analysis; (2) reliance upon state cases employing federal constitutional analysis; (3) phrasing the claim in terms of constitutional law or in terms sufficiently particular to allege a denial of a specific constitutional right; or (4) alleging facts well within the mainstream of constitutional law. *See id.* at 326. General allegations of the denial of rights to a "fair trial" and "due process" do not "fairly present" claims that specific constitutional rights were violated. *Petrucelli v. Coombe*, 735 F.2d 684, 688-89 (2d Cir. 1984).

The petitioner argues that the district court erred because the Ohio Court of Appeals stated that "appellate counsel assigned [the confrontation] issue as error [on direct appeal]" when that court rendered its decision on the *Murnahan* motion. Citing *Ylst v. Nunnemaker*, 501 U.S. 797 (1991), the petitioner contends that, in deciding whether the Ohio courts reached the merits of his federal claim, the federal courts must "look through to the last state court rendering a judgment" on that claim. He asserts that *Ylst* requires us to take the statement in the *Murnahan*-motion opinion literally and hold that the district court erred.

In the alternative, the petitioner argues that, even discounting the *Murnahan*-motion opinion, his direct appeal "fairly presented" that claim. The petitioner maintains that his appellate counsel took most of the actions this court deemed significant to the "fair presentation" analysis in *Franklin*. First, he argues that he presented his

Confrontation Clause claim by citing the United States Constitution, "due process," and his right to a "fair trial." Second, he notes that some of the state precedent cited in his appellate brief contained analysis of the Confrontation Clause. Third, he maintains that the preclusion of inquiry into the subsequent rape accusations should have, by itself, alerted the Ohio Court of Appeals to a possible violation of the Confrontation Clause.

The petitioner argues finally that, even if his claim is procedurally defaulted, this court may review the claim on the merits because the ineffective assistance of his appellate counsel was the "cause" of the default. Citing unpublished opinions from this court dealing with examination into prior accusations of rape, the petitioner contends that his Confrontation Clause claim was a "dead bang winner" and his appointed counsel, therefore, committed a gross error in failing to assert it.

The respondent argues that the statement from the *Murnahan*-motion opinion is, at best, ambiguous and, therefore, this court should look to the substance of the petitioner's direct appeal. The respondent contends that on direct appeal the petitioner argued only that the trial judge erroneously applied the Ohio rape shield law when he limited inquiry into the subsequent rape accusations. The respondent also notes that the petitioner's appellate brief did not cite any federal precedent and that most of the state

cases cited by the petitioner dealt solely with Ohio evidence law.

As to the petitioner's alternative argument that the ineffective assistance of appellate counsel excuses his procedural default, the respondent contends that appellate counsel made a valid strategic choice in excluding the Confrontation Clause claim.

We are of the opinion that the petitioner did not "fairly present" his claim. In his direct appeal, the petitioner focused entirely on the applicability of Ohio's rape shield law. Ohio Rev. Code Ann. 2907.02. He did not cite any federal precedent and his appellate brief only alleges that the trial judge's limitation on cross-examination denied him a "fair trial" and "due process." As this court recognized in *Franklin*, this is not sufficient to alert a state court that an appellant is asserting the violation of a specific constitutional right. While it is true that a few of the state cases cited by the petitioner on direct appeal contain references to the Confrontation Clause, the majority of those cases were concerned with Ohio evidence law. We do not think that a few brief references to the Confrontation Clause in isolated cases is enough to put state courts on notice that such a claim had been asserted. Thus, we hold that the petitioner failed to "fairly present" his Confrontation Clause claim to the Ohio courts.

We are not persuaded that, pursuant to *Ylst*, any statements in the *Murnahan*-motion opinion require a

different conclusion. Giving the petitioner the benefit of the doubt, the most we can say is that the Ohio Court of Appeals erred in its *Murnahan* opinion. While we recognize that, in *Ylst*, the Supreme Court stated that "[i]f the last state court to be presented with a particular federal claim reaches the merits, it removes any bar to federal-court review that might otherwise have been available," *see Ylst*, 501 U.S. at 801, we do not think this statement is an invitation to the federal courts to seize upon mistakes by state courts to review procedurally defaulted claims. We reach this conclusion partly because of the respect federal courts owe to state courts which have a responsibility equivalent to that of the federal courts to guard constitutional rights. *See generally Rose v. Lundy*, 455 U.S. 509, 522 (1982). Thus, we think it is both prudent and accurate to recognize that the statement relied upon by the petitioner in the *Murnahan*-motion opinion is a mistake. Consequently, we hold that the *Murnahan*-motion opinion has no effect on our conclusion that the petitioner did not "fairly present" his claim to the Ohio courts.

We hold next that the alleged error of appellate counsel in failing to raise the petitioner's Confrontation Clause claim does not constitute "cause" to excuse the petitioner's procedural default. In order to succeed on a claim of ineffective assistance of appellate counsel, a petitioner must show errors so serious that counsel was scarcely functioning as counsel at all and that those errors

undermine the reliability of the defendant's convictions. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Rust v. Zent*, 17 F.3d 155, 161-62 (6th Cir. 1994). Strategic choices by counsel, while not necessarily those a federal judge in hindsight might make, do not rise to the level of a Sixth Amendment violation. *Jones v. Barnes*, 463 U.S. 745, 750-54 (1983). We note that, en route to reversing an opinion from this court, the Supreme Court has recently reemphasized that "[n]ot just any deficiency in counsel's performance" is sufficient to excuse procedural default; "the assistance must have been so ineffective as to violate the Federal Constitution." *Edwards v. Carpenter*, 120 S. Ct. 1587, 1591 (2000).

Contrary to the petitioner's assertions, his Confrontation Clause claim is not a "dead bang winner." The unpublished cases cited by the petitioner, which of course have limited precedential force, *Boggs v. Brigano*, No. 94-4000, 1996 WL 160822 (6th Cir. Apr. 4, 1996), and *Lemmon v. State of Ohio*, No. 92-3284, 1993 WL 15164 (6th Cir. Jan. 22, 1993), do not stand for the proposition that the preclusion of cross-examination into prior rape accusations is a per se violation of the Confrontation Clause. Moreover, even if those cases were as strong as petitioner maintains, we note that the petitioner's appellate counsel would not have had the benefit of that precedent when he filed the petitioner's appellate brief in 1990. In fact, when the petitioner filed his direct appeal, there was

precedent to the effect that precluding inquiry into unrelated rape accusations does not offend the Confrontation Clause. *See, e.g., United States v. Bartlett*, 856 F.2d 1071, 1087-89 (8th Cir. 1988). The petitioner's appellate counsel may well have examined these cases and decided that there were stronger arguments than the Confrontation Clause claim. Thus, while a different lawyer might have done otherwise, the decision of the petitioner's appellate counsel not to assert his Confrontation Clause claim was not unreasonable and affords no basis for us to conclude that he was not functioning as "counsel" in the Sixth Amendment sense. *See Jones*, 463 U.S. at 750-54. Consequently, we are without jurisdiction to review the merits of the petitioner's arguments.

B.

The petitioner argues next that the district court erred when it held that he procedurally defaulted on his *Brady* claim. The petitioner presents three purported flaws in the district court's procedural default holding. First, he proposes that there exists a constitutional right to submit a pro se appellate brief on direct appeal. It is the petitioner's theory that the denial of this alleged right constitutes "cause" to excuse his procedural default.

Second, the petitioner argues that he implicitly presented his *Brady* claim in his *Murnahan* motion. He

asserts that, when the Ohio Court of Appeals ruled on the substance of his ineffective assistance of appellate counsel claim, that court had to analyze the merits of his *Brady* claim.

Third, the petitioner contends that the ineffective assistance of his appellate counsel establishes "cause" and "prejudice" sufficient to overcome his procedural default. With heavy reliance on *United States v. Minsky*, 963 F.2d 870 (6th Cir. 1992), the petitioner argues that the prosecution is required to disclose exculpatory evidence in a fashion timely enough to allow defense investigation into the substance of those accusations. According to the petitioner, the disclosure of the subsequent rape accusations on the second day of trial was plainly untimely and it was a gross error for his counsel not to assert such an allegedly obvious claim.

The respondent maintains that the presentation of the *Brady* claim in the pro se appellate brief does not excuse the petitioner's procedural default. According to the respondent, the Ohio Court of Appeals gave the petitioner the option of dismissing his appellate counsel and relying on the claims presented in his brief, an option the petitioner "made the considered decision" not to exercise.

The respondent argues next that McMeans presented only an ineffective assistance of appellate counsel claim in his *Murnahan* motion. Citing *Picard v. Connor*, 404 U.S. 270, 275-76 (1971), the respondent argues that asserting one

constitutional claim that shares a common factual predicate with another is not a sufficient presentation of the latter to excuse a previous procedural default.

Finally, the respondent contends that in cases such as this a state complies with its duty to disclose exculpatory evidence if the trial judge reviews a confidential file in camera and discloses any exculpatory evidence therein at some point during the trial. According to the respondent, the trial judge did just that at the petitioner's trial and, therefore, the petitioner's appellate counsel made the reasonable choice not to present a "feckless" claim on direct appeal.

In state criminal proceedings, the prosecution is obligated under the Due Process Clause of the Fourteenth Amendment to disclose evidence that is favorable to the accused and "'material ... to guilt or ... punishment.'" *United States v. Bagley*, 473 U.S. 667, 674 (1985) (citation omitted). Evidence is "material" if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 682. Where a state protects the confidentiality of records prepared by child protection agencies, as does the State of Ohio, the Supreme Court has held that defense counsel has no right to inspect those records. *Pennsylvania v. Ritchie*, 480 U.S. 39, 59 (1987). Instead, it is sufficient for the trial judge to inspect the records in camera and disclose any exculpatory evidence

contained therein. *Id.* at 60. Generally, exculpatory evidence must be produced by the prosecution "in time for effective use at trial." *Minsky*, 963 F.2d at 875.

The Supreme Court has held that a defendant has no constitutional right to represent himself on direct appeal. *Martinez v. Court of Appeal of California*, 120 S. Ct. 684, 692 (2000). Clearly, this holding contradicts the petitioner's assertion that there exists a constitutional entitlement to submit a pro se appellate brief on direct appeal in addition to the brief submitted by appointed counsel. Thus, we reject the petitioner's argument that the Ohio Court of Appeals' decision to strike his pro se brief constitutes "cause" to excuse his procedural default.

We are also not persuaded by the petitioner's argument that the Ohio Court of Appeals considered the merits of his Brady claim when it heard his *Murnahan* motion. It cannot be the case that, by merely asserting several alleged constitutional violations which appellate counsel failed to raise to a state court, the federal courts have habeas jurisdiction to consider the merits of each alleged error. If that were the case, the requirement that a habeas petitioner "fairly present" his constitutional claims to the state courts would be meaningless. *See Franklin*, 811 F.2d at 325. We, therefore, hold that the petitioner's argument lacks merit and he did procedurally default on his *Brady* claim.

Regarding the petitioner's contention that ineffective assistance of appellate counsel excuses his procedural default, we must defer to the Ohio Court of Appeals' treatment of that question. Pursuant to 28 U.S.C. @ 2254(d)(1), federal habeas review of legal issues decided in state court is limited to deciding whether the state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. @ 2254(d)(1). "[A] state-court decision is contrary to [the Supreme] Court's precedent if the state court arrives at a conclusion opposite to that reached by this Court on a question of law" or if "the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to ours." *Williams v. Taylor*, 120 S. Ct. 1495, 1519 (2000). "[A] state-court decision involves an unreasonable application of [the Supreme] Court's precedent if the state court identifies the correct governing legal rule from this Court's cases but unreasonably applies it to the facts of the particular state prisoner's case" or "if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Id.* at 1520. The state court's decision cannot be contradicted under the "unreasonable application" prong of

section 2254(d)(1) unless that court's decision is "objectively unreasonable." *See id.* at 1521.

The petitioner does not argue that the prosecution failed to disclose exculpatory evidence. Rather, the petitioner maintains that his appellate counsel should have argued that disclosure was untimely. The Ohio Court of Appeals held that appellate counsel's decision not to raise this argument was not an error so gross as to amount to a Sixth Amendment violation. Because this particular case of alleged ineffective assistance of appellate counsel is not "materially indistinguishable from a relevant Supreme Court precedent," we hold that the Ohio appellate court's decision was not "contrary to ... clearly established Federal law." *See id.* at 1519 (emphasis omitted). We are also of the opinion that the Ohio court's application of the *Strickland* standard was not "objectively unreasonable." *See id.* at 1521. The Ohio trial judge disclosed the evidence of the subsequent rape accusations on the second day of trial after in camera review of the FCCS file. This action was essentially in compliance with what the Supreme Court has held the United States Constitution requires in cases such as this. *See Ritchie*, 480 U.S. at 59. The petitioner does not direct our attention to any evidence in the record (and we have found none) indicating that he did not have time to use this evidence "effectively." *See Minsky*, 963 F.2d at 875. The Ohio Court of Appeals noted that, after receiving the information in the FCCS reports, "[the petitioner] could

have availed himself of an in-camera hearing" had "[he] wished to proffer evidence of the falsity of the [subsequent] accusations." The petitioner, however, took no action to prove to the trial judge that the subsequent rape accusations were false. Thus, the petitioner's *Brady* claim has obvious weaknesses and, therefore, we cannot conclude that his appellate counsel's service fell below that which the Sixth Amendment demands. Consequently, the petitioner fails to show "cause" to excuse his procedural default, and we affirm the district court's holding that the federal courts do not have jurisdiction to review the merits of this claim.

C.

The petitioner contends that, contrary to the opinion of the district court, the federal courts have habeas jurisdiction to review his juror bias claim. In support of that contention, the petitioner reasserts the denial of his alleged constitutional entitlement to submit a pro se appellate brief. He also argues again that the Ohio Court of Appeals considered his juror bias claim when it heard his *Murnahan* motion. For reasons already discussed, we reject those arguments.

The petitioner argues, in the alternative, that his appellate counsel's failure to assert his juror bias claim on direct appeal is yet another instance of constitutionally

inadequate representation, allowing this court to exercise jurisdiction over his claim.

Finally, it is the petitioner's theory that the respondent is judicially estopped from arguing procedural default to this court. According to the petitioner, when the respondent moved to dismiss the petitioner's second habeas petition for failure to exhaust his state remedies, the respondent argued that the petitioner had not procedurally defaulted on his juror bias claim. The petitioner contends that, because the respondent made this alleged argument to support its motion to dismiss, it should not be allowed to argue procedural default now.

As to the petitioner's contention that the ineffective assistance of his appellate counsel excuses his procedural default, the respondent argues that "the state courts correctly held that ... appellate counsel was constitutionally adequate because there were reasonable grounds for not asserting th[at] claim" and this court should defer to that ruling. The respondent also maintains that, even if judicial estoppel should apply in the situation the petitioner describes, the petitioner did not present a juror bias claim in his second habeas petition. Therefore, according to the respondent, it could not have made any misrepresentation regarding that particular claim.

Under the Sixth Amendment, a state defendant is entitled to be tried by an impartial jury. *See, e.g., Dennis v. United States*, 339 U.S. 162, 171-72 (1950). A defendant

maintaining juror bias must be afforded an opportunity to prove actual bias. *Nevers v. Killinger*, 169 F.3d 352, 373 (6th Cir.), *cert. denied*, 527 U.S. 1004 (1999).

We again hold that the Ohio Court of Appeals' decision that appellate counsel did not commit a *Strickland* error in failing to assert the petitioner's juror bias claim was not "objectively unreasonable." *See Williams*, 120 S. Ct. at 1521. Through no fault of appellate counsel, no transcript of the voir dire proceedings existed because the petitioner's trial counsel waived transcription of that proceeding. We think that the petitioner could have successfully asserted his right to prove actual juror bias only if there was some credible evidence to support an inference of potential bias. The petitioner's appellate counsel, however, had no such evidence. Consequently, we cannot fault his decision not to assert an unsubstantiated claim or quarrel with the Ohio Court of Appeals' decision that the petitioner received constitutionally adequate assistance of appellate counsel. Thus, the petitioner fails to demonstrate adequate "cause" to excuse his procedural default and, therefore, we cannot review his claim.

The doctrine of judicial estoppel forbids a party from taking a position inconsistent with one successfully and unequivocally asserted by that same party in an earlier proceeding. *Warda v. Commissioner of Internal Revenue*, 15 F.3d 533, 538 (6th Cir. 1994). In *Russell v. Rolfs*, 893 F.2d 1033 (9th Cir. 1990), the Ninth Circuit applied the doctrine

of judicial estoppel to the State of Washington after it had argued that a prisoner needed to pursue an "adequate and available" state postconviction remedy before seeking relief in federal court. *Id.* at 1037. That court ruled that, because of its earlier assertion as to the "availab[ility]" of postconviction relief, the State of Washington could not subsequently argue procedural default in the federal courts. *Id.* at 1038.

We hold that the respondent is not judicially estopped from arguing procedural default. Even if we were inclined to follow the Ninth Circuit's methodology in *Russell*, which we are not, this case is distinguishable. As noted by the respondent, the petitioner did not even raise a juror bias claim in his second habeas petition and, therefore, the respondent did not make any misrepresentation that the Ohio courts could or would consider the juror bias claim in a state postconviction proceeding. Thus, there is no inconsistent position to which the respondent must now adhere.

D.

The petitioner argues that he is entitled to habeas relief because he was denied the effective assistance of trial counsel. The sole error of trial counsel asserted by the petitioner is counsel's failure to exercise unused peremptory challenges to remove the two allegedly biased jurors.

According to the petitioner, this inaction by counsel demonstrates that "counsel's performance fell way below the ... objective standard of reasonableness." The petitioner also maintains that, because his jury had two allegedly biased members, his conviction cannot be deemed reliable and he has, therefore, established "prejudice" under the *Strickland* standard.

To establish a claim for ineffective assistance of counsel, a defendant must show that his counsel's performance was constitutionally deficient and that counsel's deficient performance was prejudicial. *Strickland*, 466 U.S. at 687. If an alleged error was not "prejudic[ial]," a federal court need not determine whether counsel's performance was constitutionally deficient. *See id.* at 697.

Although the petitioner did raise a claim of ineffective assistance of trial counsel on direct appeal, he did not refer to his trial counsel's decision not to remove the two allegedly biased jurors as an instance of error. He did not refer to this alleged error until he submitted subsequent motions to the Ohio courts. By that time, the Ohio courts held that the issue of the ineffectiveness of trial counsel was *res judicata*. As with the rest of the petitioner's claims, we, therefore, may not review this argument unless the petitioner can demonstrate "cause" and "prejudice" to overcome his procedural default. *See Murray*, 477 U.S. at 485.

The petitioner, however, does not present us with any reason why we should not respect the application of *res judicata* by the Ohio courts. After having thoroughly reviewed the record, we conclude that he cannot establish "prejudice" to excuse his procedural default. The evidence against the petitioner was both substantial and, for the most part, credible. We, therefore, fail to see how the seating of two allegedly biased jurors undermines the reliability of the petitioner's conviction. Consequently, we have no jurisdiction to review the petitioner's narrow argument.

III.

For the foregoing reasons, the order and opinion of the district court are AFFIRMED.

CONCUR BY: CLAY (In Part)

DISSENT BY: CLAY (In Part)

DISSENT: CLAY, Circuit Judge, concurring in part and dissenting in part. I agree with the majority's conclusion that Petitioner procedurally defaulted his juror bias claim and did not demonstrate cause and prejudice to excuse the procedural default. However, I disagree with the majority's conclusion that Petitioner did not "fairly present" his Sixth

Amendment claim to the Ohio state courts, as well as with the majority's disposition of Petitioner's *Brady* claim.

Petitioner claims that the prosecution's failure to timely produce evidence of the victim's prior rape allegations violated his Sixth Amendment right to confrontation. The majority concluded that Petitioner did not fairly present his Sixth Amendment claim to the Ohio state courts and as a consequence, waived the claim for federal habeas review. A state prisoner seeking federal habeas relief "fairly presents" the substance of each claim to state courts, as required, by citing applicable provisions of the Constitution, federal decisions using constitutional analysis, or state decisions employing constitutional analysis in similar fact patterns. *See* 28 U.S.C. 2254(b); *Carter v. Bell*, 218 F.3d 581, 606-07 (6th Cir. 2000). Because Petitioner cited the Sixth Amendment in his state court appeal, and because the Ohio Court of Appeals understood that Petitioner was asserting his Sixth Amendment right to confront a witness as evidenced by the language used in its opinion, I believe that Petitioner "fairly presented" his confrontation claim to the Ohio state courts. I therefore believe the majority should have reached the merits of Petitioner's Sixth Amendment claim.

Although the majority is correct in concluding that Petitioner procedurally defaulted on his *Brady* claim, a review of Petitioner's claim is not foreclosed so long as he can "demonstrate cause for the default and actual prejudice

as a result of the alleged violation of federal law." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). A petitioner can generally demonstrate cause if he can present a substantial reason to excuse the default. *See Rust v. Zent*, 17 F.3d 155, 161 (6th Cir. 1994). In *Murray v. Carrier*, the Supreme Court stated that "the existence of cause for procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." 477 U.S. 478, 486-89 (1986). Thus, ineffective assistance of counsel can constitute cause.[1] *See id.*

---

[1]The Supreme Court recently held that when a petitioner relies upon an ineffectiveness of counsel claim as cause to excuse his procedural default, the ineffectiveness of counsel claim must itself have been exhausted before the state courts in order to comply with the commands of *Murray v. Carrier*, 477 U.S. 478, 489 (1991). *See Edwards v. Carpenter*, ___ U.S. ___, 120 S. Ct. 1587, 1591-92 (2000). In the case at hand, pursuant to Petitioner's *Murnahan* motion, he presented his claim that his appellate counsel grossly erred in failing to raise his *Brady* claim to the trial court; he appealed that decision to the Ohio Court of Appeals; and filed an application for leave to appeal the court of appeals decision to the Ohio Supreme Court, but his application was denied. Therefore, *Carpenter* has been satisfied in that Petitioner exhausted his state court remedies before seeking federal habeas relief. *See* 120 S. Ct. at 1592.

Petitioner argues that the refusal of his appellate counsel to raise a *Brady* violation on his direct appeal resulted in ineffective assistance of appellate counsel thereby constituting cause for the procedural default. Although tactical choices regarding issues raised on appeal are properly left to the sound professional judgment of counsel, *see United States v. Perry*, 908 F.2d 56, 59 (6th Cir. 1990), based upon the factual circumstances of this case, and the lack of overwhelming evidence against Petitioner, it was below the objective standard of reasonableness for appellate counsel not to raise a *Brady* violation on Petitioner's direct appeal.

As the record indicates, the two prior allegations of rape did not come to light until after the first day of trial. The victim alleged that she had been raped by her girlfriend's boyfriend in April of 1988 and by a thirty-eight year old man in June of 1988. Due to the untimely disclosure of this evidence by the government, Petitioner was unable to determine the veracity of the victim's allegations. As a result, the trial court refused to allow the prior rape allegations into evidence to impeach the credibility of the victim because under the Ohio Rape Shield Law, the prior rape allegations could not be brought out at trial unless they were false. *See* Ohio Rev. Code Ann. 2907.02(D). Because Petitioner's appellate counsel was aware of the untimely disclosure by the government and the resulting prejudicial repercussions to Petitioner, it

was objectively unreasonable for Petitioner's appellate counsel not to raise a *Brady* claim on direct appeal. Petitioner's appellate counsel thus rendered ineffective assistance of counsel constituting cause to excuse the default. *See Banks v. Reynolds*, 54 F.3d 1508, 1515 (10th Cir. 1995) (holding that appellate counsel who failed to raise a *Brady* claim rendered petitioner ineffective assistance of appellate counsel); *see also Carrier*, 477 U.S. at 486-89.

Turning to the actual prejudice prong of the cause and prejudice standard, it is well established that a prosecution's failure to disclose evidence that is favorable and material to the issue of guilt violates a defendant's right to due process. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963). Here, the record does not allow for a determination of whether Petitioner was actually prejudiced by his counsel's failure to raise the *Brady* claim because the record is insufficient to determine whether the prior rape allegations were false. Defense counsel did not request an in camera hearing. However, had an in camera hearing been requested and had it yielded a finding that the alleged victim's rape allegations against two other men were false, then a *Brady* violation occurred because Petitioner was denied the use of "evidence that [could have been] used to impeach the credibility of a witness[,]" *see Schledwitz v. United States*, 169 F.3d 1003, 1012 (6th Cir. 1999), thus resulting in actual prejudice to Petitioner. Inasmuch as it is not possible to determine the veracity of the victim's prior

rape allegations on the record before us, I would remand to the district court with instructions to hold an evidentiary hearing to determine whether the prior rape allegations were in fact false. If so, Petitioner was prejudiced by his counsel's failure to raise the *Brady* violation claim, thereby providing a sufficient basis to excuse his procedural default. *See Coleman*, 501 U.S. at 750.

In addition, if the prior rape allegations were found to have been false, I would find Petitioner's Sixth Amendment right to confront his accuser was violated but for this Court's recent holding in *Boggs v. Collins*, ___ F.3d ___, No. 99-3325, 2000 WL 1335377, at *6-*10 (6th Cir. Sept. 18, 2000). In a case such as this, where the physical evidence is far from compelling, and the determination of guilt or innocence turns upon the credibility of the victim and the accused, it is all the more important that a defendant have the right to confront his accuser.

For the foregoing reasons, I would conditionally grant the habeas petition by ordering the Petitioner's release unless the State on remand conducts an evidentiary hearing to determine whether the prior rape allegations were actually false. If the rape allegations are proven false, Petitioner's application for the writ should be granted and a new trial ordered.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

KENNETH J. MURPHY
98 JUN 11 PM 12:42
U.S. DISTRICT COURT
SOUTHERN DIST OHIO
WEST DIV CINCINNATI

JERRY MCMEANS,
Petitioner

vs.

Case No. C-1-97-54
(Beckwith, J.)

ANTHONY BRIGANO, WARDEN,
Respondent

OPINION AND ORDER

Petitioner, Jerry McMeans, while confined at the Warren Correctional Institution in Lebanon, Ohio, filed this pro se action for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. This matter is before the Court on the petition, respondent's return of writ, and petitioner's reply. (Docs. 1, 18, 21).

Factual And Procedural Background

On November 7, 1987, appellant, Jerry McMeans, was indicted and charged with six counts of rape. On February 16, 1989, appellant was arrested at his Racine,

Wisconsin home on a fugitive warrant and returned to Ohio for trial.

At the trial, Wendy Self, appellant's step-daughter, testified that when she was nine years old, her mother summoned her upstairs to her bedroom and ordered her to take off her clothes. Her mother, who was drunk, told appellant what to do, and appellant had sexual intercourse with Wendy. Wendy also testified that approximately one week later, appellant had vaginal intercourse with her again. Wendy also testified that appellant forced her to perform fellatio on him more than once when she was between the ages of nine and ten. On September 4, or 5, 1987, appellant made Wendy perform fellatio on him. This happened again on September 7, 1987, and after she complied, appellant gave her $10.

Sometime during the course of this conduct, Wendy told her natural father, Donald Self ("Self"), that appellant was "messing with" her. At that time, Self spoke with Wendy's mother and Self assumed his ex-wife would take care of the problem. However, after the

September 7 incident, Wendy again told Self what appellant was doing and Self called Franklin County Children's Services ("FCCS"). Wendy also told her fifth-grade teacher about the abuse and, thereafter, FCCS picked Wendy up at school and took her into their custody. Wendy was then interviewed by a doctor at Children's Hospital and a Columbus police officer.

After Wendy was taken into custody by FCCS, appellant, his wife and their children were evicted from their home for non-payment of rent. After a short stay at Wendy's grandmother's home, appellant bought a car and, in October 1987, the family moved to Wisconsin where appellant found employment. Wendy did not see appellant from the time she was removed from the home to the time of the trial. Wendy's family communicated with her through letters and it was as a result of the return address on one of these letters that appellant was located in Wisconsin, was arrested and returned to Ohio.

> Appellant testified and denied any sexual conduct with Wendy. Appellant also testified that Wendy was making up the charges so that she could live with Self.

State v. McMeans, No. 89AP-1037, 1990 WL 122571, *1 (Ohio Ct. App. Aug. 23, 1990) (unpublished) (Doc. 18, Vol. I, Ex. 7, pp. 1-3).

Following a jury trial in the Franklin County Court of Common Pleas, petitioner was found guilty on five counts of rape; a sixth count was dismissed at trial. (Doc. 18, Vol. I, Ex. 2). On August 10, 1989, petitioner was sentenced to serve three consecutive terms of life imprisonment and two concurrent terms of life imprisonment. (*Id.*)

With the assistance of counsel, petitioner appealed the convictions and sentence to the Ohio Court of Appeals. lie presented four assignments of error:

> [1.] THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE IN THE STATE'S CASE IN CHIEF TESTIMONY OF PRIOR BAD ACTS ALLEGEDLY COMMITTED BY APPELLANT. THE ERRONEOUS ADMISSION OF THIS EVIDENCE WAS IN CONTRAVENTION OF EVID.R.403 AND 404, AND R.C.

SECTION 2945.59 AND DEPRIVED APPELLANT OF HIS RIGHT TO A FAIR TRIAL GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION.

[2.] THE TRIAL COURT ERRED BY EXCLUDING EVIDENCE OF PROSECUTRIX'S PRIOR ACCUSATIONS OF RAPE AGAINST OTHERS IN VIOLATION OF APPELLANT'S RIGHT TO A FAIR TRIAL, AND TO DUE PROCESS OF LAW AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION.

[3.] THE TRIAL COURT ERRED BY OVERRULING APPELLANT'S MOTION TO DISMISS COUNTS ONE, TWO, AND FOUR OF THE INDICTMENT WHEN THEIR LACK OF TEMPORAL SPECIFICITY PREJUDICED

> APPELLANT'S ABILITY TO FAIRLY DEFEND HIMSELF AND DEPRIVED HIM OF DUE PROCESS OF LAW IN VIOLATION OF HIS FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 AND 16 OF THE OHIO CONSTITUTION.
>
> [4.] APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION.

(*Id.*, Ex. 3).

Petitioner filed a pro se motion for leave to file a supplemental brief. Petitioner sought to present additional allegations of ineffective assistance of counsel and three additional assignments of error:

> [5.] THE APPELLANT WAS DENIED DUE PROCESS OF LAW BY THE WITHHOLDING AND DENIAL OF

EXCULPATORY EVIDENCE AND DISCOVERY MATERIALS.

[6.] THE APPELLANT WAS DENIED A FAIR Trial AND DUE PROCESS OF LAW BY THE MISCONDUCT OF A POLICE INVESTIGATOR WHO PREMATURELY CONCLUDED THAT THE APPELLANT WAS GUILTY, AND THEREBY FAILED TO PERFORM SCIENTIFIC TESTS THAT MAY HAVE YIELDED EXCULPATORY EVIDENCE.

[7.] THE CUMULATIVE EFFECT OF ALL PREVIOUS ERRORS DENIED APPELLANT A FAIR TRIAL AND DUE PROCESS OF LAW.

(*Id.*, Ex. 4). His motion for leave to file the supplement brief was denied. (*Id.*, Ex. 5). On August 24, 1990, the Ohio Court of Appeals overruled the four assignments of error argued in counsel's brief and affirmed the trial court's decision. (*Id.*, Ex. 8).

Petitioner filed a pro se notice of appeal in the Ohio Supreme Court. (*Id.*, Ex. 9). In support of his appeal he presented four propositions of law:

[1.] DID THE FAILURE OF THE TRIAL COURT TO GIVE LIMITED INSTRUCTIONS RISE TO THE LEVEL OF PLAIN ERROR AND DEPRIVE APPELLANT OF DUE PROCESS OF LAW AND A FAIR TRIAL?

[2.] DID THE EXCLUSION OF EVIDENCE OF THE VICTIM'S PRIOR ACCUSATIONS OF RAPE ON OTHERS DEPRIVE APPELLANT OF HIS RIGHT TO CONFRONTATION AND DUE PROCESS?

[3.] WAS APPELLANT'S RIGHT TO DUE PROCESS VIOLATED BY THE VAGUENESS OF THE INDICTMENT TO SET FORTH A PROPER TIME FRAME OF WHEN THE CRIMES OCCURRED.

[4.] THE APPELLANT'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE CONSTITUTION DUE TO COUNSEL'S NUMEROUS ERRORS WHICH VIOLATED THE APPELLANT'S RIGHT TO EFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

(*Id.*, Ex. 10). On February 13, 1991, the Ohio Supreme Court overruled petitioner's motion for leave to appeal and dismissed the appeal "for the reason that no substantial constitutional question exists therein." *State V. McMeans*, No. 90-2002 (Ohio Feb. 13, 1991) (Doc. 18, Vol. I, Ex. 14). Petitioner next filed a motion for reconsideration, which was denied on April 24, 1991 . (Doc. 18, Vol. I, Exs. 15, 16).

While his direct appeal was still pending in the Ohio Supreme Court, petitioner filed a motion for a new trial on grounds that the trial court erred by failing to instruct on a lesser-included offense, that he was denied effective assistance of counsel and that the state failed to comply with the rules of discovery; he also filed a motion requesting a partial trial transcript. (*Id.*, Ex. 17). The motions were overruled. (*Id.*, Ex. 18).

Petitioner next pursued an appeal of the trial court's decision overruling his motions for a new trial and for a transcript. (*Id.*, Ex. 19). The Ohio Court of Appeals affirmed the trial court's decision after determining that his claim based on a lesser- included offense was procedurally barred, that his claim of ineffective assistance of counsel had been addressed on direct appeal, that the motion for a new trial was properly dismissed as untimely, and that petitioner was not entitled to a copy of the transcript. (*Id.*, Exs. 23, 24). Petitioner next filed a pro se notice of appeal in the Ohio Supreme Court and reasserted the arguments

presented to the Court of Appeals. On September 25, 1991, the Ohio Supreme Court overruled petitioner's motion for leave to appeal and dismissed the appeal. (*Id.*, Ex. 29).

Additionally, while his direct appeal was pending in the Ohio Court of Appeals, petitioner filed a petition for a writ of habeas corpus in the Court of Common Pleas for Warren County. He raised a single ground for relief, i.e., that he was denied his right to a speedy trial guaranteed by the United States and Ohio constitutions. (*Id.*, Vol. II, Ex. 30). The petition was dismissed, and a subsequent motion for reconsideration was overruled. (*See id.*, Exs. 31-33). Petitioner's appeal to the Ohio Court of Appeals was dismissed as untimely. (*Id.*, Ex. 35).

In November 1991, petitioner filed a federal petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The petition was dismissed without prejudice on petitioner's own motion to allow him an opportunity to exhaust his ineffective assistance of counsel claims. *See McMeans v. Brigano*, No. C-1-91-786 (S.D. Ohio Aug. 31, 1992) (Doc. 1 , Vol. II, Ex. 44). Respondent's motion to alter or amend the judgment of dismissal was denied. (Doc. 18, Vol. II, Ex. 50).

While the motion to alter or amend judgment dismissing the federal petition was pending in the United States District Court for the Southern District of Ohio, Western Division, petitioner filed a second petition for a writ of habeas corpus in the court's Eastern Division. (*Id.*,

Vol. III, Ex. 68). The new petition was transferred to the Western Division for consolidation with case No. C-1-91-786. (*Id.*, Ex. 73). Ultimately, this second petition was also dismissed without prejudice to refiling after petitioner exhausted state remedies. (*Id.*, Ex. 89).

In September 1992, petitioner returned to state court where he filed an application for delayed reconsideration in the Ohio Court of Appeals. He asserted that he was denied the effective assistance of both trial and appellate counsel. (*Id.*, Vol. II, Ex. 51). The Court of Appeals found that petitioner's claims were not supported by the record; the application for delayed reconsideration was denied. (*Id.*, Ex. 58).

In a "Direct Appeal Brief" to the Ohio Supreme Court, petitioner reasserted his claims of ineffective trial and appellate counsel. Additionally, he argued that the trial court's failure to record the voir dire portion of his trial resulted in a denial of due process, and that the state intentionally withheld impeachment evidence. (*Id.*, Ex. 61). On March 24, 1993, the Ohio Supreme Court construed petitioner's brief as a motion for jurisdiction, overruled the motion and dismissed the appeal. (*Id.*, Ex. 67).

On April 19, 1995, petitioner filed a motion to vacate or set aside sentence in the Franklin County Court of Common Pleas. (*Id.*, Vol. III, Ex. 90). He argued that his trial counsel was ineffective for failing to challenge or strike two jurors he had previously determined could not be

objective. (*Id.*) Petitioner also argued that the trial court erred by failing to record the voir dire portion of his trial and that his appellate counsel was ineffective for failing to present these issues on appeal. (*Id.*) The court determined that review of petitioner's claims was barred under the doctrine of res judicata; petitioner's motion was denied. (*Id.*, Ex. 92).

On appeal from the denial of his motion to vacate or set aside sentence, petitioner presented five assignments of error to the Ohio Court of Appeals:

> [1.] THE TRIAL COURT ABUSED ITS DISCRETION BY DISMISSING THE POST-CONVICTION PETITION WITHOUT CONDUCTING EVIDENTIARY HEARING PURSUANT TO RC 2953.21 et seq.
>
> [2.] THE TRIAL COURT ERRED IN DISMISSING PETITIONER'S DUE PROCESS CLAIM THAT HIS RIGHTS TO A FAIR APPEAL WERE VIOLATED BY THE COURTS FAILURE TO RECORD THE VOIR DIRE PORTION OF THE JURY SELECTION ON THE BASIS OF RES JUDICATA.

[3.] THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED TO THE PREJUDICE OF THE PETITIONER WHEN IT FAILED TO REVIEW AND/OR CONSIDER ALL OF THE SUPPORTING DOCUMENTS SUBMITTED TO THE TRIAL COURT BY PETITIONER BEFORE DISMISSING HIS PETITION FOR POST-CONVICTION RELIEF.

[4.] THE TRIAL COURT ERRED IN DISMISSING PETITIONER'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM ON THE BASIS OF RES JUDICATA.

[5.] THE TRIAL COURT ABUSED ITS DISCRETION BY FILING CLEARLY ERRONEOUS FINDINGS OF FACTS AND CONCLUSIONS OF LAW.

(*See id.*, Ex. 96). The Court of Appeals overruled petitioner's five assignments of error; the judgment of Court of Common Pleas was affirmed. (*Id.*)

Petitioner next pursued an appeal in the Ohio Supreme Court based on the same five errors presented to

the court of appeals. (*Id.*, Ex. 99). Leave to appeal was denied and the appeal was dismissed. (*Id.*, Ex. 101).

On March 13, 1996, petitioner filed a motion for leave to file a motion for a new trial in the Franklin County Court of Common Pleas based on allegedly recently discovered evidence showing that he was denied trial by an impartial jury. (*Id.*, Ex. 102). The motion was overruled. (*Id.*, Ex. 105).

Petitioner based his appeal from the denial of his motion on a claim that the trial court erred "when it failed to determine whether the appellant was 'unavoidably prevented' from discovering new evidence within the one hundred twenty (lay period established for asserting 'newly discovered' evidence." (*Id.*, Ex. 107). The court of appeals concluded that the trial court had correctly denied the motion for leave to file a motion for a new trial because (a) the allegedly newly discovered evidence was not new at all and (b) claims petitioner sought to raise in a new trial were barred by res judicata. (*Id.*, Ex. 109). A subsequent motion for reconsideration was overruled. (*Id.*, Ex. 113). Petitioner's notice of appeal to the Ohio Supreme Court was accompanied by his claim that "[a] criminal defendant is entitled to a new trial upon a showing that he was convicted by a jury that was tainted and biased." (*Id.*, Ex. 115). The Ohio Supreme Court was not persuaded; on December 20, 1996, the court declined jurisdiction and dismissed the appeal. (*Id.*, Ex. 117).

On January 21, 1997, petitioner filed the instant petition for a writ of habeas corpus. Petitioner presented the following grounds for relief:

> Ground one: Petitioner's Due Process rights to a fair appeal were violated by the State's claim that no record of the voir dire was made. ... Appellate counsel was ineffective for refusing to order transcript of voir dire.
>
> Ground two: Petitioner was denied his Sixth Amendment right to trial by an impartial jury.
>
> Ground three: Ineffective assistance of trial and appellate counsel.
>
> Ground four: Petitioner's right to Due Process of law and a fair trial was violated by the State's withholding of crucial impeachment evidence that was material and relevant to presenting defense.
>
> Ground five: Petitioner's right to confrontation was violated by the unreasonable restriction on cross examination of the complaining witness and her father.

> Ground six: The state improperly and prejudicially [sic] presented 'other acts' testimony which was inflammatory and prejudicial to petitioner without giving 'limiting instructions,' thus rendering the trial fundamentally unfair.

(Doc. 1, pp. 5-6). Petitioner also asserts that he is entitled to review of his petition under the standards applicable to petitions filed before April 24, 1996, the effective (late of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214.

In the return of writ, respondent contends that certain of petitioner's claims have been waived due to procedural defaults in the state courts and that remaining claims are without merit.

OPINION

A. Petitioner's First, Second And Fourth Grounds Are Waived Due To Procedural Defaults In The State Courts, And his Claim Of Ineffective Assistance Of Appellate Counsel, Presented In Ground Three, Lacks Merit.

Before reaching the merits of petitioner's claims, the Court must determine whether petitioner has waived any

claims because he committed a procedural default by failing to fairly present them to state courts. *See Wainwright v. Sykes*, 433 U.S. 72 (1977).

In recognition of the equal obligation of state courts to protect the constitutional rights of criminal defendants, and in order to prevent needless friction between state and federal courts, a state defendant with federal constitutional claims must fairly present those claims to the state courts before raising them in a federal habeas corpus action. 28 U.S.C. § 2254(b), (c); *Anderson v. Harless*, 459 U.S. 4, 6 (1982) (per curiam); *Picard v. Connor*, 404 U.S. 270, 275-76 (1971). If he fails to do so, he may have waived the unraised claims for purposes of federal habeas corpus review. *See Weaver v. Foltz*, 888 F.2d 1097, 1099 (6th Cir. 1989). If, because of a procedural default, a petitioner can no longer present his claims to a state court, he has waived them unless he can demonstrate cause for the procedural default and actual prejudice resulting from the alleged constitutional errors, or that failure to consider the claims will result in a "fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991); *see also Murray v. Carrier*, 477 U.S. 478, 485 (1986); *Angle v. Isaac*, 456 U.S. 107, 129 (1982); *Sykes*, 433 U.S. at 87.

It is well-settled that, on federal habeas corpus review, a court may be barred from considering an issue of federal law from a judgment of a state court if the state judgment rests on a state-law ground that is both

"independent" of the merits of the federal claim and an "adequate" basis for the state court's decision. *Harris v. Reed*, 489 U.S. 255, 260-62 (1989). The "adequate and independent state ground" doctrine has been applied to state decisions refusing to address the merits of a federal claim because of violations of state procedural rules. *Id.* at 261; *Sykes*, 433 U.S. at 86-87; *see also McBee v. Grant*, 763 F.2d 811, 813 (6th Cir. 1985).

A procedural default does not bar consideration of a federal claim on habeas corpus review unless the last state court rendering a judgment in the case "clearly and expressly" states that its judgment rests on a state procedural bar. *Harris*, 489 U.S. at 263. In cases where the last state court to render a reasoned opinion on the claim explicitly relies on a procedural bar, the court will presume that a later unexplained order did not silently disregard the procedural default and consider the merits of the claim. *Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991).

1. Petitioner's First Ground

In ground one, petitioner claims that the state's failure to make a record of the voir dire proceedings resulted in a denial of his right to a fair trial. He also claims that his appellate counsel was ineffective for failing to request a transcript of the voir dire. He has waived this claim due to a procedural default.

Petitioner argued in state court, in his motion to vacate or set aside sentence filed in April 1995, that the trial court erred by failing to make a record of voir dire. (Sec Doc. 18, Vol. III, Ex. 90). The trial court denied the motion after deciding that review of petitioner's claim was barred under the doctrine of res judicata. (*Id.*, Ex. 92). The Ohio Court of Appeals, the last court to render a reasoned opinion on the claim, clearly relied on a state procedural rule when it affirmed the trial court's decision. (*Id.*, Ex. 96). The Ohio Supreme Court's later unexplained decision dismissing the appeal must be presumed to rely on the same procedural default as did the Ohio Court of Appeals. *See Ylst*, 501 U.S. at 803-04.

2. Petitioner's Second Ground

In his second ground, petitioner claims that he was denied his Sixth Amendment right to trial by an impartial jury. He alleges that one juror revealed at voir dire that her daughter was a rape victim, and that the juror has admitted that she may have been biased against petitioner.

Petitioner presented this claim, denial of his right to an impartial jury, in a motion for leave to file a motion for a new trial based on newly discovered evidence. (Doc. 18, Vol. III, Ex. 102). The trial court overruled the motion for leave after determining that the allegations, even if true, would not support a motion for a new trial. (*Id.*, Ex. 105).

On appeal, the court of appeals concluded that the trial court had correctly denied the motion for leave to file a motion for a new trial because (a) the allegedly newly discovered evidence was not new at all and (b) claims petitioner sought to raise in a new trial were barred by res judicata. (*Id.*, Ex. 109). A subsequent motion for reconsideration was also overruled on grounds that the information on which he based his claim of bias was already known by petitioner at the time of trial. In both instances, the court of appeals, the last court to render a reasoned decision on petitioner's claim of a constitutional violation, refused to consider the merits of the claim, but expressly relied on an independent and adequate state law ground. The court will presume that the later unexplained order of the Ohio Supreme Court dismissing the appeal did not silently disregard the procedural ground and consider the merits of the claim. *Ylst*, 501 U.S. at 803-04.

3. Petitioner's Fourth Ground

In ground four, petitioner contends that his right to a fair trial was violated by the State's withholding of crucial impeachment evidence. In support of this claim, petitioner alleges that the state intentionally withheld evidence of the alleged victim's prior unfounded allegations of rape against other adult males. He maintains that the "untimely release of prior rape allegations denied defense the opportunity to

investigate," thereby denying petitioner a fair trial. His claim is waived due to procedural default.

Petitioner first presented this issue to the Ohio Court of Appeals in the pro se supplemental brief submitted in support of his direct appeal. (*See* Doc. 18, Vol. I, Ex. 4). The court of appeals, however, did not consider issues raised in the pro se brief, and petitioner failed to reassert those issues in his appeal to the Ohio Supreme Court. Petitioner next presented the issue in his first motion for a new trial, which was overruled. (*See id.*, Exs. 17, 18). On appeal from the trial court's decision overruling his motion, the court of al)peals affirmed the trial court on a state procedural ground after finding that the motion for a new trial was untimely. (*Id.*, Ex. 23). Again, this court will presume that the unexplained dismissal of the appeal by the Ohio Supreme Court was based on the same procedural grounds. *See Ylst*, 501 U.S. at 803-04.

4. The Cause And Prejudice Requirement

Because the claims presented in grounds one, two and four were dismissed by the state court on procedural grounds, petitioner has committed a procedural default. Because petitioner committed a procedural default, he has waived his claims unless he shows cause for the default and actual prejudice as a result of the alleged error, or demonstrates that failure to consider the claim will result in

a "fundamental miscarriage of justice." *See Coleman*, 501 U.S. at 750; *see also Murray*, 477 U.S. at 485; *Isaac*, 456 U.S. at 129; *Sykes*, 433 U.S. at 87.

As cause for his default petitioner asserts first that his appellate counsel was ineffective for failing to request a transcript of voir dire. Petitioner contends that if a timely request were made, the lack of a record would have been discovered and the issue could have been raised on direct appeal. Petitioner also maintains that his appellate counsel was ineffective for failing to raise these issues on direct appeal.

The Supreme Court has established the analysis for determining cause under *Coleman*, with regard to a claim of ineffective assistance of counsel:

> So long as a defendant is represented by counsel whose performance is not constitutionally ineffective under the standard established in *Strickland v. Washington*, 466 U.S. 668 (1984), we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default. Instead, we think that the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's

efforts to comply with the state's procedural rules.

Murray, 477 U.S. at 488. Examples of such external factors include a showing that the factual or legal basis for the claim was not available to counsel, or that some interference by officials prevented compliance with the procedural rule. *Id.* Finally, the Court explained that the exhaustion doctrine "requires that a claim of ineffective assistance be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default." *Id.* at 488-89.

Although petitioner exhausted his claim of ineffective assistance of appellate counsel in the state courts, (*cf.* Doc. 18, Vol III, Exs. 90, 92, 96, 101), he has provided no external factor that would have impeded counsel's ability to properly raise his claims in state court proceedings. Additionally, petitioner has not established that counsel's performance was constitutionally ineffective under the standard established in *Strickland.*

To establish a claim for ineffective assistance of counsel, a defendant must show that (1) his counsel's performance was constitutionally deficient, and (2) counsel's deficient performance was prejudicial. *Strickland*, 466 U.S. at 687. The Court need not examine the question of whether counsel's performance was deficient before addressing the question of whether petitioner was prejudiced

by counsel's performance. The Court may dispose of an ineffective assistance of counsel claim by finding that petitioner made an insufficient showing on either ground. *See id.* at 697.

Petitioner has not shown that counsel's performance was deficient. Tactical choices regarding issues raised on appeal are properly left to the sound professional judgment of counsel. *United States v. Perry*, 908 F.2d 56, 59 (6th Cir.), *cert. denied*, 498 U.S. 1002 (1990). Counsel is not required to raise every nonfrivolous issue on appeal. *See Jones v. Barnes*, 463 U.S. 745, 750-54 (1983). Counsel frequently will "winnow out" weaker claims in order to focus effectively on those more likely to prevail. *Smith v. Murray*, 477 U.S. 527, 536 (1986).

Moreover, petitioner cannot show that he was prejudiced by the lack of a transcript or by counsel's failure to request a transcript of the voir dire proceedings. To show prejudice, petitioner must show that the transcript was requisite to a fair appeal. *See Bransford v. Brown*, 806 F.2d 83, 85-86 (6th Cir. 1986) (citations omitted), *cert. denied*, 481 U.S. 1056 (1987). "Mere absence of a perfect transcript does not necessarily deny one due process of law." *Mitchell v. Wyrick*, 698 F.2d 940, 941 (8th Cir.) (citations omitted), *cert. denied*, 462 U.S. 1135 (1983). Because petitioner was present at both voir dire and the trial, he did not need a transcript to know of the factual basis for raising his underlying claim of juror bias in his

direct appeal. *Accord Umphrey v. Groose*, No. 97-1692WM, 1997 WL 791656, *1 (8th Cir. Nov. 21, 1997) (per curiam) (unpublished) (state's failure to provide a copy of voir dire transcript does not constitute cause to excuse a procedural default).

Thus, counsel's performance was not deficient based on his failure to present these claims on direct appeal. Petitioner has not shown cause or prejudice to excuse his procedural default, nor does the record support a finding that this is an extraordinary case in which a constitutional violation has probably resulted in the conviction of one who is actually innocent of the crime for which he was convicted. *Murray*, 477 U.S. at 496.

Accordingly, petitioner's first, second and fourth grounds are dismissed as waived. Petitioner's claim of ineffective assistance of appellate counsel, presented in Ground Three, is denied as lacking in merit.

B. Petitioner's Claim Of Ineffective Assistance Of Trial Counsel, Presented In Ground Three, Lacks Merit.

In addition to his claim in ground three that he was denied the effective assistance of appellate counsel, petitioner also contends that the was denied the effective assistance of his trial counsel. In support of his claim he alleges that trial counsel failed to make proper objections

and improperly cross-examined witnesses by eliciting damaging and inflammatory hearsay evidence. His allegations are unavailing.

A state prisoner is not entitled to federal habeas corpus relief with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim resulted in a decision that was contrary to, or involved an unreasonable application of clearly established federal law as determined by the United States Supreme Court, or was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. 28 U.S.C. § 2244(d); *see also Harpster v. Ohio*, 128 F.3d 322, 326 (6th Cir. 1997), *cert. denied*, 118 S. Ct. 1044 (1998).[1]

Here, the Ohio Court of Appeals, as the last state court to render a reasoned opinion on the claim of ineffective assistance of trial counsel, ruled as follows:

> In his fourth assignment of error, appellant asserts that he was denied the effective

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[1]Petitioner's argument that this amended standard of review should not apply is not well taken. The Supreme Court has determined that the AEDPA generally applies to eases filed after the Act became effective on April 24, 1996. *Lindh v. Murphy*, 117 S. Ct. 2059, 2068 (1997). Petitioner filed the present petition on January 21, 1997.

assistance of counsel. Specifically, appellant asserts that his counsel carelessly cross-examined Wendy concerning her sexual conduct with appellant and turned the case into one of a continuing rape from kindergarten until Wendy was removed from the McMeans home in September 1987. Indeed, until appellant's counsel inquired of other sexual conduct between Wendy and appellant, the state had not presented any evidence of other sexual conduct between them.

Appellant has the burden of proving ineffective assistance of counsel. *State v. Smith* (1981), 3 Ohio App.3d 115. In *State v. Smith* (1985), 17 Ohio St.3d 98, the court adopted the two-prong analysis espoused in *Strickland v. Washington* (1984), 466 U.S. 668, for determining whether counsel's assistance was so defective as to require reversal of a conviction. *See, also, State v. Brooks* (1986), 25 Ohio St.3d 144, *certiorari denied, Brooks v. Ohio* (1987), 479 U.S. 1101.

* * *

> To demonstrate ineffective assistance of counsel, appellant must show that the representation by his counsel fell below an objective standard of reasonableness and, as a result, there is a reasonable probability that, but for such unprofessional errors, the result of the case would have been different. *State v. Lyle* (1976), 48 Ohio St.2d 391, *vacated in part on other grounds, Lytle v. Ohio* (1978), 438 U.S. 910.
>
> This court finds that none of the things appellant asserts as ineffective in and of themselves demonstrates ineffectiveness on the face of the record and, most certainly, do not demonstrate that the result would have been different had counsel cross-examined Wendy in a different manner. This is also true had counsel asked for a limiting instruction regarding the other acts evidence. All of these things ... could constitute trial strategy and, under the *Strickland* test, appellant has failed to establish his claim of ineffective assistance of counsel.

(Doc. 18, Vol. I, Ex. 7, pp. 11-12).

Petitioner's claim that counsel's performance was deficient is not supported by the record. Review of the record suggests that counsel's cross-examination was consistent with a strategy to discredit the witness by showing her confusion over numbers, dates and times. (*See* Doc. 1 , Partial Transcript, pp. 58, 64-67). The state court's determination that this course of cross-examination was an acceptable strategy, *see State v. McMeans*, 1990 WL 122571 at *3 (Doc. 18 Vol. I, Ex. 7, pp. 6- 7), is a finding of fact presumed correct absent clear and convincing evidence to the contrary. *See* 28 U.S.C. § 2254(e).

Under the first prong of the *Strickland* test, petitioner must demonstrate that his counsel's representation fell below an objective standard of reasonableness based on all the circumstances surrounding the case. *See* 466 U.S. at 688. Judicial scrutiny of counsel's performance must be highly deferential, and a "fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight" and to evaluate the challenged conduct from counsel's perspective at the time of the conduct. *Id.* at 689. In determining whether or not counsel's performance was deficient, the Court must indulge a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *See id.* Petitioner has not overcome the presumption that counsel's strategic decision fell below an accepted level of

performance. Thus, he failed to satisfy the first prong of *Strickland.*

Even if the Court were to assume that counsel's performance was deficient, petitioner has not shown a reasonable probability of a different outcome. *Id.* at 694. Even if the references to events alleged to have occurred prior to the times noted in the indictment were excluded, the evidence was otherwise sufficient to support a finding of guilt.

The state court decision rejecting petitioner's claim of ineffective assistance of trial counsel was neither contrary to nor unreasonable in light of clearly established federal law. *See* 28 U.S.C. § 22654(d). Accordingly, petitioner's claim of ineffective assistance of trial counsel presented in ground three is denied.

C. Petitioner's Claim That He Was Denied his Right Of Confrontation is Waived.

In ground five, petitioner's asserts that his right to confrontation was violated by the unreasonable restriction on cross examination of the complaining witness and her father. Petitioner argues that he should have been permitted at trial to question these witnesses about unsubstantiated rape accusations the alleged victim had made against other males.

To the extent petitioner alleges he is entitled to relief based on a violation of the Ohio's rape shield law or other evidentiary rules, his claim raises an issue of state law only which is not cognizable in this federal habeas corpus proceeding. *See* 28 U.S.C. § 2254(a); *see also Pulley v. Harris*, 465 U.S. 37, 41(1984); *Smith v. Sowders*, 848 F.2d 735, 738 (6th Cir.), *cert. denied*, 488 U.S. 866 (1988); *Allen v. Morris*, 845 F.2d 610, 614 (6th Cir. 1988), *cert. denied*, 488 U.S. 1011 (1989). Moreover, to the extent petitioner claims his federal constitutional right of confrontation was violated, it appears petitioner has waived this claim for purposes of federal habeas corpus review because he failed to fairly present it to the Ohio courts.

A habeas corpus petitioner must present both the factual and legal underpinnings of his claim to the state courts for the claim to be deemed "fairly presented." *Franklin v. Rose*, 811 F.2d 322, 325 (6th Cir. 1987). This requirement means that the petitioner must present his claim to the state courts as a federal constitutional issue and not merely as an issue arising under state law. *Id.* (citing *Koontz v. Glossa*, 731 F.2d 365, 368 (6th Cir. 1984)); *see also Pradier v. Rees*, 822 F.2d 1418, 1421 (6th Cir. 1987). A claim will be considered "fairly presented," even without citation to chapter and verse of the Constitution, if the presentation of the claim was "likely to alert the court to the claim's federal nature." *Nadworny v. Fair*, 872 F.2d 1093, 1097 (1st Cir. 1989) (quoting *Daye v. Attorney General of*

New York, 696 F.2d 186, 192 (2d Cir. 1982) (en banc), *cert. denied*, 464 U.S. 1048 (1984)).

A set of four guidelines has been developed for determining whether a claim was presented in such a way as to apprise the court of the claim's federal nature. *Id.* Under these guidelines, a petitioner may fairly present the constitutional nature of his claim to the state courts by (1) relying on federal cases employing constitutional analysis; (2) relying on state cases employing constitutional analysis in similar factual contexts; (3) phrasing the claim in terms of constitutional law or in terms sufficiently particular to allege a denial of a specific constitutional right; or (4) alleging facts well within the mainstream of constitutional law. *Franklin*, 811 F.2d at 326 (quoting *Daye*, 696 F.2d at 193-94). The use of a "generalized catch-all phrase," which merely alleges the deprivation of a fair trial under the United States Constitution, does not adequately apprise the state courts of the constitutional nature of the claim where the "only legal theory presented to the state courts was predicated entirely upon state evidentiary law." *Id.* General statements that the petitioner was denied a "fair trial" and "due process" are not sufficient to put state courts on notice of a specific federal constitutional claim in the absence of citation to case law employing federal constitutional analysis. *Petrucelli v. Coombe*, 735 F.2d 684, 688-89 (2d Cir. 1984).

In this case, petitioner failed to fairly present to the Ohio appellate courts his federal constitutional claim, but rather argued the issue in terms of state law only. In his brief to the Ohio Court of Appeals, petitioner relied on Ohio Rev. Code § 2907.02 as setting forth the standards for the exclusion of testimony about prior accusations of rape. (*See* Doc. 18, Vol. I, Ex. 3, pp. 16-19). He argued that Ohio's rape shield law did not require the exclusion of the evidence he had hoped to present. (*See id.* at 17-18). In support of his argument, petitioner relied only on the state statutory provision and state case law interpreting those provisions. Despite a single reference to his federal due process right, he never argued to the state appellate court that his federal constitutional rights were violated. His argument was based entirely on state law and was thus insufficient to apprise the Court of Appeals of a specific federal constitutional claim. *Cf. Petrucelli*, 735 F.2d at 688-90. Indeed, the Ohio Court of Appeals, which was the only state court to issue a reasoned decision on the issue, demonstrated it was not made aware of any federal constitutional claim when it addressed and decided the question solely in terms of state law. (*See* Doc. 18, Vol. I, Ex. 7, pp. 8-9).

Although petitioner argued in his brief to the Ohio Supreme Court that his constitutional right of confrontation was violated, (*see id.*, Ex. 10, pp. 6-8 and Ex. 12), the Ohio Supreme Court will not consider issues that a defendant

fails to present to the Court of Appeals. *See State v. Williams*, 364 N.E.2d 1364, 1367 (Ohio 1977) (and cases cited therein), *vacated on other grounds*, 438 U.S. 911 (1978); *State v. Phillips*, 272 N.E.2d 347, 352 (Ohio 1971); *State v. Jones*, 211 N.E.2d 198, 199 (Ohio 1965), *cert. denied*, 383 U.S. 918, 951 (1966). The Ohio Constitution limits the Ohio Supreme Court's appellate jurisdiction to appeals from the Ohio Court of Appeals. Ohio Const. art IV, § 2(B)(2); *see Jones*, 211 N.E.2d at 199. T he Ohio Supreme Court, therefore, lacks jurisdiction to consider constitutional claims that petitioner failed to raise in the Ohio Court of Appeals. *See id.*; *see also Leroy v. Marshall*, 757 F.2d 94, 99 (6th Cir.), *cert. denied*, 474 U.S. 831 (1985); *Fornash v. Marshall*, 686 F.2d 1179, 1185 n.7 (6th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983).

Petitioner committed a procedural default by failing to fairly present his federal constitutional claim to the Ohio courts. Because petitioner committed a procedural default, lie has waived the claim unless he shows cause for the default and actual prejudice as a result of the alleged error, or demonstrates that failure to consider the claim will result in a "fundamental miscarriage of justice." *See Coleman*, 501 U.S. at 750; *see also Murray*, 477 U.S. at 485. Petitioner has not advanced any justification for not presenting this constitutional claim to the Ohio courts. Moreover, lie has not demonstrated that failure to address the claim will result in a fundamental miscarriage of justice.

Accordingly, petitioner's state law claim is denied because it is not cognizable in this federal habeas corpus proceeding. Moreover, to the extent petitioner alleges a federal constitutional violation, the claim is dismissed as waived.

D. Petitioner's Claim Of Improperly Admitted Evidence, Presented In Ground Six Of The Petition, Is Based On An Error Of State Law And Is Not Cognizable In This Federal Habeas Proceeding.

As his final ground for relief petitioner states that the trial court allowed inflammatory and prejudicial evidence of alleged prior bad acts to come before the jury and failed to give a limiting instruction, thereby denying petitioner a fair trial. Claims based on allegations of erroneous evidentiary rulings present mixed questions of law and fact. *See Nichols v. Sullivan*, 867 F.2d 1250, 1253 (10th Cir.), *cert. denied*, 490 U.S. 1112 (1989).

An evidentiary question generally does not rise to the level of constitutional error unless the error was so prejudicial as to deprive the defendant of a fair trial. *Cooper v. Sowders*, 837 F.2d 284, 286 (6th Cir. 1988); *Walker v. Engle*, 703 F.2d 959, 962 (6th Cir.), *cert. denied*, 464 U.S. 951, 962 (1983); *Burks v. Egeler*, 512 F.2d 221, 223 (6th cir.), *cert. denied*, 423 U.S. 937 (1975). In determining whether the alleged state law error rendered the trial

fundamentally unfair, an isolated error must be considered in the context of the curative effects of the remainder of the trial. *Payne v. Janasz*, 711 F.2d 1305 (6th Cir.), *cert. denied*, 464 U.S. 1019 (1983), *citing Donnelly v. De Christoforo*, 416 U.S. 637 (1974). When such errors are alleged, the federal court's inquiry in reviewing these claims is directed to whether the evidence was rationally connected to the crime charged. *Carter v. Jago*, 637 F.2d 449, 457 (6th cir. 1980), *cert. denied*, 456 U.S. 980 (1982).

Petitioner argues that the trial court erred by permitting testimony of alleged bad acts, some of which were alleged to have occurred ten years before trial, to come before the jury, and by failing to give a limiting instruction. Petitioner complains that, "[i]n addition to evidence admitted to prove the offenses charged, the trial court allowed the state to present evidence of literally hundreds of incidents of sexual conduct between petitioner and the alleged victim." (Doc. 21 , pp. 80-81). Petitioner acknowledges that the trial court sustained defense counsel's objections to the State's first attempt to question the alleged victim about uncharged incidents. (*See id.*, p. 81).

The Ohio Court of Appeals found as follows:

> Much of the evidence regarding the other acts between Wendy and appellant came into evidence after appellant attacked Wendy's

> credibility. On redirect, the prosecutor attempted to rehabilitate Wendy by showing that her memory was not faulty regarding the dates of the alleged acts by establishing that the reason she could not remember the exact dates appellant sexually abused her was because it happened numerous times. ... Also, appellant's own counsel, in cross-examining Self and Roadeap, elicited testimony about appellant's other acts of sexual abuse of Wendy. ... The evidence regarding appellant's conduct with Wendy was related to the offense for which appellant was on trial and it had a logical connection therewith.

(Doc. 1 8, Vol. 1, Ex. 7, Pp. 6-7).

As further noted by the Ohio Court of Appeals, petitioner never requested a limiting instruction, nor did he object to the court's jury instructions. (*See id.*, p. 7) Petitioner has not shown that the trial court's failure to exclude the evidence or to give an unrequested instruction without petitioner requesting one resulted in the denial of a fundamentally fair trial. *See United States v. Campbell*, 935 F.2d 39, 44 (4th Cir.), *cert. denied*, 502 U.S. 929 (1991) (it

was not error for the trial court to fail to exclude evidence elicited by petitioner's own counsel).

Petitioner has not shown the denial of a fundamentally fair proceeding, or that the state court's decision was based on an unreasonable determination of the facts or an unreasonable application of established federal law. See 28 U.S.C. § 2254(d). Accordingly, petitioner's sixth ground is denied.

IT IS THEREFORE ORDERED THAT:

1. Petitioner's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 (Doc. 1) is DENIED with prejudice, and all pending motions are DENIED.

2. A certificate of appealability not be issued.

3. The Court certifies pursuant to 28 U.S.C.A. § 191 5(a)(3) (West Supp. 1996) that an appeal of this Order would not be taken in good faith and, therefore, denies any application by petitioner to proceed on appeal *in forma pauperis*. *See* Fed. R. App. P. 24(a); *Kincade v. Sparkman*, 117 F.3d 949, 952 (6th Cir. 1997). Petitioner remains free to apply to proceed *in forma pauperis* in the Court of Appeals. *Id.*

Date: June 10, 1998

/s/ Sandra S. Beckwith
Sandra S. Beckwith
United States District Judge

IN THE COURT OF COMMON PLEAS FOR FRANKLIN COUNTY, OHIO

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STATE OF OHIO,
Plaintiff,

JUDGE DALE A. CRAWFORD

vs. **CASE No. 87CR-11-3576**

JERRY MCMEANS,
Defendant.

DEFENDANT'S STATEMENT OF THE EVIDENCE OR PROCEEDINGS WHEN NO REPORT WAS MADE OR WHEN TRANSCRIPT UNAVAILABLE.

On or about August 8, 1989 the defendant was tried to a jury in the Franklin County Court of Common Pleas, Case No. 87CR-11-3576, for the crime of rape. The defendant was found guilty and appealed his conviction. His conviction was affirmed, Case No. 89AP-1037. Defendant then filed an "Application For Delayed Reconsideration Of Appeal" and simultaneously filed a motion requesting that he be furnished a transcript of the voir dire proceedings of his trial. Criminal R. 22 provides that "In serious offense cases all proceeding [shall] be recorded, *See State v. Grewell,* (1989) 45 Ohio St. 3d 4; *State ex rel. Hurt v. Kistler*, (1992) 63 Ohio St. 3d 306.

The word [shall] is defined thus: "As used in statutes, contracts, or the like, this word is generally

imperative or mandatory". *Blacks Law Dictionary*, 6th Ed. page 1375. In *Dorrian v. Scoto Conservancy District,* (1971) 27 Ohio St. 2d. 102, the Ohio State Supreme Court held that "In statutory construction the word 'may' shall be construed as permissive and the word [shall] shall be construed as mandatory unless there appears a clear and unequivocal legislative intent that they receive a construction other than their ordinary usage" paragraph one (1) of the syllabus. Crim. R. 22 does not appear to embody that legislative intent. However, when the Franklin County Court of Appeals granted the defendants motion for a transcript of the voir dire proceedings, the State claimed that the voir dire had not been recorded. The State further claimed that the defendant had in fact waived the recording of the voir dire. The problem with this claim by the State is thus. The State admits that there is not written waiver of the voir dire, there is nothing in the record indicating that the defendant waived the recording of the voir dire, there is no Journal Entry indicating that the defendant waived the recording of the voir dire, and defense counsel, Ronald B. Janes has executed an affidavit stating that he does not have any recall of waiving the recording of the voir dire. In other words, there is no official record the indicates in any way that the recording of the voir dire was waived. The defendant in fact denies that the voir dire was waived by anyone, and states that he personally observed, the voir dire being recorded. Based on the States unsubstantiated claim

that the voir dire was not recorded and that a transcript of the voir dire is unavailable, defendant, pursuant to App. R. 9(c) submits the following "Statement of The Evidence Or Proceedings When No Report Was Made Or When The Transcript Is Unavailable"

DEFENDANT'S STATEMENT OF THE VOIR DIRE PROCEEDINGS

On or about August 8, 1989 the defendant was tried to a jury of the crime of rape, Franklin County Court of Common Pleas Case No. 87CR-11-3576. Defendant Dale A. Crawford at approximately 8:00 A.M. Defendant remained in this 'holding cell' until approximately 10:00 A.M. while the court, Judge Dale A. Crawford conduct other court business.

At approximately 10:00 A.M. defendant was escorted into the courtroom of Judge Crawford and the jury voir dire commenced. Those present in the courtroom at that time, and throughout the trial, were: Judge Dale A. Crawford, presiding Judge: Assistant Franklin County Prosecutor Gary S. Shroyer, counsel for the State: Nancy J. Neff, Official Court Reporter; and Ronald B. Janes, Counsel for the defendant, and of course, the defendant.

When defense counsel begin the voir dire potential jurors one of the first questions asked of the panel as a whole was "Have any of you ever been the victim of a

crime or have a family member who was ever the victim of a crime?" Two jurors, Jacqueline J. Hunt and John Grey, raised their hands indicating that the answer was 'yes'.

Defense counsel first addressed Ms. Hunt and inquired as to whether it was Ms. Hunt who was a crime victim or if it was a family member. Ms. Hunt explained that she had a daughter who had been a rape victim. Counsel then inquired if the perpetrator had been arrested. Ms. Hunt replied that he had and that the case had been, resolved by a plea bargain between the accused rapist and the State. Counsel next inquired if Ms. Hunt thought that she would be able to render a fair and impartial verdict int the instant case based solely on the evidence presented at trial. Ms. Hunt replied: "I think I can". This concluded the voir dire of Ms. Hunt.

At this point defendant requested that counsel exercise a peremptory challenge and remove Ms. Hunt from the jury panel. Counsel refused to do so, and instead replied: "She'll be ok". However, counsels voir dire notes (Exhibit B) clearly show that his was not counsels true impression of Ms. Hunt, as counsel, after voir direing Ms. Hunt, noted on is voir dire sheet under Ms. Hunts name "Can't be objective".

Counsel next voir dired Mr. Grey. In response to counsels questions Mr. Grey revealed that he had a daughter who had been violently murdered and that he was acquainted with and had worked with Franklin County

Prosecutor, Michael Miller. Defendant again requested that counsel exercise a peremptory challenge and strike Mr. Grey from the jury panel. Again counsel refused and defendant was subjected to a jury trial which was undoudtly tainted by two jurors who could not be the impartial jurors envisioned by the constitution. Juror Hunt in fact has admitted by sworn affidavit that she was indeed biased against the defendant. (Exhibit A).

At approximately 11:30 A.M. the court called a recess for lunch. At this time approximately seven (7) or eight (8) jurors had been voir dired and seated. At about 1:30 P.M. defendant was returned to the courtroom to find that a full panel of jurors had been seated. The case then proceeded to trial.

Respectfully Submitted

Jerry McMeans 213-801
Warren Correctional Inst.
P.O. Box 120 (2B-283)
Lebanon, Ohio 45036

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing "Defendants Statement of The Evidence or Proceedings When no Report Was Made or when The Transcript is Unavailable" has been sent to the Franklin County Prosecutor at his office, via first Class U.S. Mail, Postage Prepaid, Attention Steven L. Taylor, 369 South High Street, Columbus, Ohio 43215 on this 4th day of March, 1996

/s/ Jerry McMeans
Jerry McMeans

D-7

BEST AVAILABLE COPY

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	**No. 89AP-1037**
	:	**(REGULAR CALENDAR)**
v.	:	
	:	
JERRY MCMEANS,	:	
	:	
Defendant-Appellant.	:	

DECISION
Rendered on November 24, 1992

Michael Miller, Prosecuting Attorney, and *Steven L. Taylor,* for appellee.

Jerry McMeans, pro se.

ON APPLICATION FOR DELAYED RECONSIDERATION OF APPEAL.

BOWMAN, J.

Appellant, Jerry McMeans, has filed an application for delayed reconsideration of this court's opinion in

State v. McMeans (Aug. 23, 1990), Franklin App. No. 89AP-1037, unreported (1990 Opinions 3480), wherein this court affirmed the judgment of the Franklin County Court of Common Pleas which found appellant guilty of five counts of rape, including finding that appellant purposely compelled the victim to submit by force of threat of force.

Pursuant to *State v. Murnahan* (1992), 63 Ohio St.3d 60, claims of ineffective assistance of appellate counsel may be raised in an application for reconsideration in the court of appeals or in a direct appeal to the Supreme Court. When the time period for reconsideration in the court of appeals and direct appeal to the Supreme Court has expired, a delayed claim of ineffective assistance of appellate counsel must first be brought in an application for delayed reconsideration in the court of appeals where the alleged error took place. If delayed reconsideration is denied, then the defendant may file for a delayed appeal in the Supreme Court.

In his first assignment of error, appellant asserts that his appellate counsel was ineffective because he did not raise every specific act of ineffectiveness of trial counsel in his assignment of error that trial counsel was ineffective. Specifically, appellant now asserts that trial counsel was

ineffective because he failed to: prepare and research for the case; object to certain evidence; obtain certain psychological reports about the victim; excuse two jurors, thus creating a biased jury composition; object to hearsay testimony as well as make objections to other testimony; properly cross-examine witnesses; and to object to prosecutorial misconduct in closing argument.

In his direct appeal before this court, appellant's counsel assigned as error that appellant's trial counsel had been ineffective, and a number of the issues which appellant raises now were raised on direct appeal. In order to demonstrate that counsel's performance was deficient, appellant must show that counsel made errors so serious that he was not functioning as counsel as guaranteed by the Sixth Amendment. Appellant must also show that this deficient performance prejudiced him to such an extent that he was deprived of a fair adjudication. See *Strickland v. Washington* (1984), 466 U.S. 668; *State v. Hester* (1976), 45 Ohio St.2d 71.

This court cannot say that appellant's appellate counsel was ineffective when he failed to raise *each* of the instances of ineffectiveness of trial counsel in the initial appeal before this court that appellant now asserts in his motion for delayed reconsideration. As this court stated in

its previous opinion, none of the things that appellant asserted as ineffective in and of themselves demonstrated ineffectiveness on the face of the record. The same is true of the claims which he now brings. There is no evidence in the record that, had trial counsel's tactics been different, the result of the trial would have been different. As such, appellant has failed to demonstrate that his appellate counsel was ineffective when he did not assign each of the specific instances of alleged ineffectiveness of trial counsel as error.

In his second assignment of error, appellant asserts that appellate counsel was ineffective because he failed to assign as error a Crim.R. 16 discovery violation where the state withheld evidence of prior rape reports made by the alleged victim, as well as withheld medical and psychiatric records.

The information which appellant asserts was not given him was contained in a Franklin County Childrens' Services file. In *State v. Hart* (1988), 57 Ohio App.3d 4, the court held that confidential records of a childrens' services board may be subjected to an *in camera* inspection for exculpatory evidence in a criminal prosecution.

The trial court in this case reviewed the childrens' services file and disclosed the appropriate information to

both parties. It was as a result of this *in camera* inspection that appellant became aware of the information he now asserts was not properly provided to him pursuant to Crim.R. 16.

This court has previously addressed the issue of the prior rape reports and found that the trial court did not err in excluding this evidence from the trial. This is also true of the medical information appellant seeks. As a result, this court cannot find that appellate counsel was ineffective in failing to raise the issues appellant now raises as assignments of error in his previous appeal.

In his third assignment of error, appellant asserts that this appellate counsel erred in not arguing that his confrontation rights were denied. Appellant asserts that he should have been able to confront the victim with her prior false accusations of rape. This court finds that appellate counsel did not err in this regard and that appellate counsel assigned this very issue as error in the initial appeal to this court. As this court previously found, the record does not support appellant's claims on this issue.

Based on the foregoing, this court finds that there are no substantive grounds for relief in the present case and, therefore, appellant's application for delayed reconsideration must be denied.

Application for delayed reconsideration denied.

WHITESIDE and MARTIN, JJ., concur.

MARTIN, J., of the Carroll County Court of Common Pleas, sitting by assignment in the Tenth Appellate District.

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

FILED
COURT OF APPEALS
FRANKLIN COUNTY, OHIO
2000 FEB 21 PM 4:16
CLERK OF COURTS

STATE OF OHIO,
Plaintiff - Appellee,

v.

No. 89AP-1037
(REGULARCALENDAR)

JERRY MCMEANS,
Defendant - Appellant.

JOURNAL ENTRY

Appellant's pro se motion for leave to file a brief in addition to the one filed by counsel is denied and the brief tendered by appellant, pro se, is stricken. To the extent appellant desires this court to consider his brief, appellant may discharge counsel and re-submit his pro se brief for filing.

/s/ Archery E. Reilly
JUDGE

cc: Bonnie I. Maxton, APA
John A. Bay, AOPD
Jerry McMeans

IN THE COURT OF APPEALS
TENTH APPELLATE DISTRICT
FRANKLIN COUNTY, OHIO

STATE OF OHIO,
Plaintiff - Appellee,

v. **Case No. 89 AP-1037**

JERRY MCMEANS,
Defendant - Appellant.

APPLICATION FOR DELAYED RECONSIDERATION OF APPEAL

APPELLANT'S BRIEF

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APPELLANTS ASSIGNMENT OF ERROR NO.2

INEFFECTIVE ASSISTANCE OF APPELLANT COUNSEL

IN RE: RULE 16 DISCOVERY VIOLATION

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The prosecution in the instant case purposely, knowingly and willfully withheld valuable impeachment evidence for the sole purpose of gaining a tactical advantage over the defense. The Prosecution was well aware that by withholding until well into trial, the evidence prior unfounded and unsubstantiated rape reports against other men made by the alleged victim, a substantial tactical advantage would be gained by the State. The Prosecution was well aware that due to the late disclosure of the prior rape reports (the prior rape reports were disclosed after the first day of trial at which time the alleged victim had completed her testimony) the defense would be surprised, and would be unable at this date to investigate and to

determine the truth or falsity of the prior rape reports. The Prosecution reasoned, and rightly so, that this would make it impossible for the defense to effectively us this impeachment evidence in preparation and presentation of its case or in any other meaningful way. This is completely contrary to the rules and intent of pre-trial discovery and to the United States Supreme Courts hold in *Brandy v. Maryland*, (1963) 373 U.S. 83.

A valid *Brady* complaint contains three elements; (1) The Prosecution must suppress or withhold evidence, (2) which is favorable and (3) material to the defense, *Moore v. Illinois*, 408 U.S. 786 (1972). The instant case clearly meets all of the above cited criteria in that (1) The Prosecution was well aware, long before trial, that the alleged victim had made several unfounded and unsubstantiated reports of rape against other men. However, the Prosecution choose to withhold this valuable impeachment evidence until well into the trial, at which time it was impossible for the defense to investigate, and to substantiate the truth or falsity of the prior rape reports and to use this evidence in any way, which affirmatively prejudice the Appellant. (2) Had this evidence been released in a timely manner as required by Crim. R. 16, the defense would have been able to show to the jury, the proclivity of the alleged victim to make rape reports as will, which would certainly be favorable to the defense and (3) was clearly material for impeachment purposes. This

evidence neatly fits the criteria setforth in *U.S. v. Perdono*, (1991) 929 F.2d 967 (3rd Cir.) as "evidence that is favorable and material to the accused so that, if disclosed and used effectively, it may make the difference between conviction and acquittal". Without the evidence that was withheld by the state, the jury was denied ample opportunity to evaluate the credibility of the complaining witness and the Appellant was denied his Fifth Amendment right to due process of law as guaranteed by *Brady v. Maryland*, supra.

In the instant case the Appellant made a pre-trial request for discovery under Crim. R. 16, asking for in part, any statements of witnesses, prior bad acts information on witnesses, any medical reports or physical evidence, and any exculpatory or impeachment evidence. However, as said before, the State of Ohio withheld discoverable evidence, and by such, denied Appellant a fair trial.

"Due process requires that the government not suppress evidence favorable to the accused or discrediting to its own case, and upon request, that is disclose to the defense all such information" Brady, supra. Also, "Due process can be denied by failure to disclose alone", *United States v. Hiber*, (1972) 463 F.2d 445.

Here in the instant case, it is obvious from a reading of the record that the State of Ohio withheld discovery material. In one such instance, the trial Judge brings the

existence of such non disclosure when he addresses the Prosecutor on record and says,

(The Court) "I know that your office is busy, I know that you have a lot of cases. You have got to realize this is a life sentence. This is probably next to murder, the most sever case we have down here, and you are treating it with an attitude that you don't give a shit if it gets reversed on appeal. I mean to come up and say, I don't know if there is any prior statements"... (TP. 102)

(Prosecutor) "No" ...

(The Court) "Well gee, i asked the officer just now and **their may or may not be a tape**. You've got to have, when you are preparing a case in front of me or anybody else in this system, you have to have researched the case. I hope you have talked to the officers. I hope you know a Rule 16 comes up, you can say here it is, yes, I know exactly whats in that file. You don't know what is the file. Well, let me tell you, there is a lot in this file" .... (TP. 102-103)

Continuing on, this exchange took place between the court and defense attorney, wherein the court advised the defense attorney that a rape report had been withheld from him:

(Defense Counsel) "Your going to fast for me Judge. The 38 year old, is this the question I just asked"?

(The Court) "No. The question you asked was of July of this year and July is not accurate. It was June. There is a report in here that she charged somebody, YOU DON'T KNOW ABOUT THE OTHER ONE". (TP. 103)

Further on, the court again has to admonish the attorneys;

(The Court) "First of all, this is a unique case. You have had at least 24 hours and I don't want to see a life case handled as cavalier a **both of you** are handing this. SOMEBODY IS GETTING SCREWED and the system is getting screwed" (TP. 104-105)

Thus, by all of the above it is obvious that all discovery materials were not turned over to the Appellant in violation of crim. R. 16, and that the trial Judge recognized that the Appellant was not getting a fair trial.

Further, it is not up to the State of Ohio to decide what documents would be helpful to a defendants case, and then to withhold *Brady* material by simply saying that he did not think that it would be helpful or relevant to the defendants case. Yet this is exactly what the State has done here, as can be seen by the following excerpts from the trial record:

(The Court) "Are their parts of the file that you have extricated? (TP. 50)

(Prosecutor) "What I have told the social worker and Mr. James was my understanding that anything particularly pertinent to this particular situation. I understand that their are pyschologicals to a Psychiatrist, I don't think its necessarily pertinent to the facts surrounding this particular case. You know, I would be glad to sit down with the Court and we can, you know, **pull out what hasn't been show to Mr. Janes**, see if their is any merit given to turning it over to him." (TP. 50)

However, as stated, such a prosecution ploy is contrary to the rules of discover, as medical and psychiatric background information relating to a witness, and any material which might reflect on the motivations of a witness is discoverable under the *Brady* rule. See also *United States v. Agurs*, (1976) 427 U.S. 97, which holds that "The

prudent Prosecutor will resolve doubtful questions in favor of disclosure".

It must also be noted that while the Prosecutor made the before stated offer to go through the file with the Court and to turn over the defendant anything of merit, this offer came well after the trial was under way. This not only violates the discovery rule but is contrary to the very heart and intent of the pre-trial discovery procedure. The Ohio State Supreme Court has held that "The propose of the discovery rule is to prevent surprise and secreting evidence favorable to one party" *Lakewood v. Papadelis*, (1987) 32 Ohio St.3d 1.

It has also been held that "Disclosure by the government **must be made at such a time** as to allow the defense to use the favorable material **effectively in preparation and presentation** of its case, even if satisfaction of the criterion requires pre-trial disclosure". *United States v. Pollack*, (1976) 534 F.2d 964.

Thus, in the instant case, it is clear that Appellant was denied due process of law and a fair trial by the Prosecutor's misconduct in failing to disclose discovery materials. The trial court went on record to state that it found materials pertaining to the alleged victims other reports of rape were withheld, and the Prosecutor himself admitted on record that he withheld the alleged victims medical psychological reports and large portion of the Children Services file that was pertinent to the case.

It has since been learned by the Appellant that the prior allegations of rape made by the alleged victim against other were **All** investigated by Franklin County Children Services and the **All** were found to be unsubstantiated.

The Prosecutor, as an officer of the Court, (and even in his zeal to obtain a conviction) has a duty to see that the rights of an accused are not trampled, and that the rules of the Court are followed. Yet here, either through a deliberate attempt to deprive the Appellant's of a fair trial, or simply through indifference and a lack of preparation, the Prosecutor failed to comply with the rules of discover. In fact, on four occasions, the trial Judge chastised the Prosecutor for his outright sloppiness in preparing the States case, and for his failure to research the files and to comply with the rules of discovery. These instances are contained in the records as follows:

(The Court) "What was withheld?"

(Prosecutor) "I'm not quite sure. I would have to ask her out their".

(The Court) "You don't know what they have to him and what she didn't?" (TP. 52)

(Here, although it boggles the mind, we have a social worker, Lisa Long, from Franklin County Childrens

Services, who is completely untrained in the law, and who also is a witness for the state, standing out in the hall and deciding what is and what is not discoverable).

(The Court) "But what I'm saying is that you have a file, and I don't know the answer to the question either, because I don't think you know the answer. I don't think anybody knows the answer because everybody is going to say, I'm only going to start preparing it at 9:00 o'clock the day its going to trial". (TP. 105)

(The Court) "What am I going to do, adjourn for three days and let him review the file or maybe just five hours? You haven't even reviewed it yet". (TP. 105)

(The Court) "Now I don't know if this is Rule 16 material. I don't know the answer to that question, but we can't have a trial get destroyed because nobody has the answer or nobody is thinking of those questions". (TP. 107)

Obviously, the Prosecutor lack of preparation resulted in deprivation of the Appellant's rights (since the State did not timely release Rule 16 evidence in its possession). The trial judge must have certainly thought this deficient conduct quite serious to so berate the State attorney on record as he did.

Further, not only are we dealing with pertinent parts of the Childrens Services file which was spoke of in the before quoted transcript proceedings, but we are also dealing with statements the alleged victim and other witnesses made to police officers during this police investigation. This is shown by the defense attorneys statements to the Court as contained in the record as follows:

(Defense Counsel) "It is the defense's contention that we have not been provided proper discovery under Rule 16, and we base that on the testimony of the police officer that in, as I recall the testimony, he reviewed his file, his entire police file before the jury, and their was no mention of the witness..., the victim indicating that the mother and brother were witnesses to the crime of rape.

I was provided the document, which indicated that she, the victim, told the Doctor or told people at Children Hospital when examined that she had been raped in the presence of her mother. The problem is, that statement was made two weeks after the police officer in the tape recording that we played to the court, asked her directly about her mother being present. So what I'm suggesting is on September 16, when the police made this tape, he had information from some source, and I don't know where, that the mother was present during the crime. It is nowhere

in the police report and it shows up, to verify two weeks later when she makes the first statement at Children Hospital.

I don't know whether there are any other statements, nor can I determine, why police officer out of a clear blue sky would talk about the mother being present unless he had some statement, written or recorded". (TP. 307) Thus, it is apparent that these parts of the discovery request were also withheld by the Prosecutor.

Further, we must remember the circumstances of the instant case. There was no physical evidence against the Appellant whatsoever, nor did the expert witness who testified for the State directly identify the Appellant as the perpetrator of these crimes. Dr. Coury, the expert witness for the state testified that he could neither tell when the sexual conduct occurred by his examination or who preformed the sexual activity. In fact, Dr. Coury was not even sure that there had been sexual activity, as he testified saying "I believe that she has had or **could have had** intercourse" (TP. 194) Dr. Coury also testified that he based his testimony and opinion merely on an assumption, "on the history she related" (TP. 192 lines 15-25).

Additionally, while the State also presented Lisa Long, (a Franklin County Childrens Services worker) and Gerald Roadcap, (a Columbus Police Detective) as witnesses, they merely testified to their respective conduct in the reporting and investigation of the rape allegations.

Therefore, the entire gist of the States case and the only evidence against the Appellant, was the unsubstantiated testimony of the alleged victim herself. Yet in opposition, the only evidence that was offered in defense of the appellant was his own testimony denying the acts charged.

By such, this case became one in which the sole issue was testing the credibility of the accused against that of the accuser, a contest rarely won by the accused. In light of such a credibility test, the importance of proper cross-examination cannot be stressed enough. Certainly, since their was no corroboration evidence, the defence could have destroyed the credibility of the alleged victim and the States case would have fallen. Yet now could the defence conduct a proper cross-examination and attack the alleged victims credibility, when the information which could be used for impeachment purposes is withheld by the State? The prosecution should not be rewarded for violation Crim.R.16 and the Appellant should not be penalized by excluding valuable impeachment evidence because of the States violation.

Thus, this misconduct by the prosecution attorney was very prejudicial to the Appellant and amounted to a discovery violation of substantial Constitutional magnitude, since not only was the Appellants ability to fairly defend himself impaired by the States non disclosure, but it also creates a very real probability that the verdict of the trier of fact would have been affected had all of the rule 16

material been disclosed. (Note; even once it became known that discovery materials had been withheld form the Appellant, the trail court still did not release the withheld materials but instead said it would preserve the file for appeal. By this, the Appellant was forced to proceed through trial without the use of such evidence, which further handicapped the Appellant by preventing him from using this relevant impeachment evidence.)

The trial court, on record, admits that a discovery violation occurred by saying:

(The Court) "Even though they may have accidentally may have known-it was an accident that their was a violation because they didn't know what was in the file". (TP. 114) However, it was the Prosecutor's duty and obligation, to the Court as well as to the Appellant, to know what was in the files, and the ?Brady rule is very clear and unambiguous when it states that "The reason for the withholding of impeachment evidence is irrelevant".

Here in the instant case, the withholding of evidence of prior rape reports made by the alleged victim, and hoe withholding of medical and psychiatric records, not only violated the Brady rule, but also rendered the defense counsel ineffective. As before stated, because of the untimely release of evidence of prior rape reports made by the alleged victim, defense counsel was unable to

investigate these reports was thus denied the rightful opportunity to test the credibility of the complaining witness in any meaningful way. This is completely contrary to the intent and purpose of the pre-trial discovery rules and effectively denied the Appellant due process of law and a fair trial.

Although the Appellant requested that Appellate Counsel raise this very valid and important issue on direct Appeal, Appellate Counsel ineffective and denied Appellant a meaningful Direct Appeal. Due to the ineffectiveness of both trial counsel and Appellate Counsel, Appellant's judgment of conviction should be reversed and Appellant afforded a new trial with all Constitutional safeguards intact.

APPELLANT'S ASSIGNMENT OF ERROR NO.3.

IN RE: CONFRONTATION VIOLATION BY THE STATE.

THE APPELLANT WAS DENIED THE RIGHT TO CONFRONTATION BY THE TRIAL COURTS UNREASONABLE AND ARBITRARY RESTRICTION ON CROSS EXAMINATION OF THE STATES CHIEF WITNESSES.

Appellant contends that his right to confrontation as guaranteed by the sixth and Fourteenth amendments to the United States Constitution was violated by the trial courts exclusion of relevant evidence and the denial of the opportunity for effective cross-examination of the States complaining witness and her father.

Here in the instant case, Appellant was charged with the rape of his step daughter. There was no physical or medical evidence that a rape or any other sexual activity had ever taken place. The case turned solely on the credibility of the accused versus the credibility of the accuser. In such a case, wide latitude must be allowed in cross-examination to insure that the jury is given all relevant information to enable them to render an informed, intelligent and fair decision.

In a credibility contest, the only way a defendant can present a meaningful defense is if he is allowed to show the trier of fact that the alleged victim has lied in the past about the very same thing that she is testifying to in court today. Refusal to allow a defendant this right destroys the Constitutional right to Confrontation and presentation of evidence in one's behalf. In the instant case this right was denied and Appellant was denied a fair trial.

In the case sub judice, the Appellant contends that the alleged victim has a history, dating back to 1984, of fabrication reports of rape and molestation against several other men. This entire area of relevant and important evidence was excluded from the juries knowledge and consideration.

In the instant case, the alleged victim lived with her mother and Appellant, her step father. The alleged victim had many times voiced a preference for living with her natural father. The Appellant contents that the rape charges were fabricated against him to further her interest in living with her natural father.

In attempting to establish this evidence of prior self serving reports of rape for the juries consideration, counsel attempted to cross-examine the alleged victim as to these prior rape reports made by her. (TP.64) The prosecution objected, the objection was sustained, and this evidence was excluded from the juries consideration. Further on in the trial, counsel attempted to cross-examine the alleged victims

father concerning prior rape reports made by the alleged victim. (TP. 98). Again the prosecution objected and again the objection was sustained. Again the prior reports of rape made by the alleged victim were excluded from the juries consideration.

This evidence was relevant and material to insure a fair trial and its admission was constitutionally required to expose to the jury the alleged victims proclivity to cry rape whenever it served her purpose. Professor Wigmore sated the reasons well in:

3A Wigmore on evidence 934a (Chadbouen rev. ed. (1970)

> Occasionally is found in women complainants testifying to sex offenses by men, a dangerous form of abnormal mentality dangerous here, because it affects testimonial trustworthiness while not affecting other mental operations. It consists in a disposition to fabricate irresponsibly charges of sex offenses against persons totally innocent...Sometimes it is associated with unchaste conduct in the witness, sometimes not. but its nature is well known to psychiatrists and is recognizable by them. Testimony to its existence in an individual should always be receivable. (emp. Add.)

In a case such as the instant case, where the verdict necessarily turned on the credibility of the complainant, it is imperative that the defendant be given an opportunity to place before the jury evidence so fundamentally affecting the complainants credibility. It is difficult to imagine a more 'imperative' category of defense evidence than that which shows the proclivity of a complainant to make rape accusations.

Credibility was not the only issue precluded by the Courts unreasonable restriction on cross-examination. The prior allegations of rape made by the alleged victim, even assumed arguendo, that they were true, were also relevant, material and crucial to the defense in still another sense. During Direct and cross-examination the alleged victim was explicit and quite knowledgeable about sexual acts and was very adept at describing such acts. The Prosecutor commented on this knowledge when making his closing argument to the jury. By precluding the prior allegations of rape against others from the juries knowledge and consideration, the Court created a mandatory and conclusive presumption that the alleged victim must have gained her sexual knowledge at the hands of the Appellant. This presumption was unrebuttable due to the trial courts ruling excluding the evidence of prior rape reports made by the alleged victim. This evidence was Constitutionally required to comport with the Sixth Amendment's Confrontation guarantee. Appellant contends that the prior allegations of

the rape against others were highly relevant to show that the alleged victim could have gained her sexual knowledge from a source other than himself. Therefore, Constitutional Confrontation guarantees required that the Appellant be allowed to apprise the jury of the prior allegations of rape made by the alleged victim. To preclude this information from the juries consideration was Constitutional error of the first magnitude and violated Appellants right of confrontation.

Further, it is unreasonable for the trial court to disregard it own rules of evidence, to wit, Evid R. 611 (B) which states;

"Scope of cross-examination"
"Cross-examination **shall** be permitted
on all relevant matters and matters
affecting credibility"

The Ohio State Supreme Court has ruled that "cross-examination [must] be permitted on all relevant matters and matters affecting credibility" *State v. Eastham*, 39 Ohio St. 3d 307 (1988)

In this regard, the Ohio Supreme Court has held as follows in *State v. Hannah*, (1978) 54 Ohio St. 2d 84 at the syllabus;

> "Where a conviction must ture substantially upon the identification of the defendant as the guilty actor by the victim-witness, any unreasonable limitation upon defendants right to a complete cross-examination of the witness is prejudicial error"

In the case sub judice, the Appellant's conviction clearly turned, substantially, upon his identification by the alleged victim as the party who raped her. Thus, under *Hannah* (supra) the unreasonable restriction imposed upon Appellant's right to cross-examine her was prejudicial error.

While a trial court has discretion in the control of cross-examination, it cannot justify a curtailment that keeps from the jury relevant and important facts bearing ont he trustworthiness of crucial testimony, *United State v. Harris*, (1974) 501 F.2d 1-8.

The United States Supreme Court has consistently rebuffed attempts to whittle away a defendant's rights to Confrontation and cross-examination. In *Davis v. Alaska*, (1974) 415 U.S. 308, the Court struck down a shield statute designed to protect a juvenile state witness' prior delinquency adjudications. The Court reasoned;

> "The States policy interest in protecting the confidentially of juvenile offender's record cannot require yielding of so vital a

Constitutional right as the effective cross-examination for bias of an adverse witness" (Emp. Add.)

The "Constitution requires that a criminal defendant be given the opportunity to present evidence that is relevant, material and favorable to the defense" *United State v. Begay*, (1991) 937 F.2d 515.

In the instant case, the trial court stated on record, that "Mr. Janes would like the opportunity to cross-examine the victim on the prior rape reports that she gave. I have advised Mr. Janes that I will not permit that" (TP. 119) Many Courts have held that "Defendants right to confrontation may be violated if the trial court precludes an entire relevant area of cross-examination," *United States v. Lonedog*, 929 F.2d 568 (1991) citing *United States v. Atwell*, 776 F.2d 416.

The Confrontation Clause provides two types of protection for defendants, (1) The right to physically face those who testify against him and (2) The right of cross-examination, "A primary interest of the clause" *Kentucky v. Stincer*, 482 U.S. 730, (1987) City *Douglas v. Alabama*, 380 U.S. 415 (1965). The Court also held in *Delaware v. Van Arsdall*, 475 U.S. 673 (1986) that "A blanket prohibition against exploring potential bias through cross-examination is ["a per se error] so that the actual impact of such an error is not examined".

The Court again recognized the importance of a full and unrestricted opportunity for cross-examination to detect bias when it held that "The right to cross-examination includes the opportunity to show that the witness is biased or that their testimony is exaggerated or unbelievable" *Pennsylvania v. Ritchie*, (1987) 480 U.S. 39.

The United States Supreme Court held in *Davis v. Alaska*, (supra) that "The exposure of a witness motivation in testifying is a proper and important function of the Constitutionally protected right of cross-examination" The *Davis* court additionally held that "No specific showing of prejudice was required because the petitioner had been denied the right of effective cross-examination which would be Constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it" *id.* at 318 citing *Smith v. Illinois*, 390 U.S. 129 (1968) and *Brookhart v. Janis*, 384 U.S. 1 (1966)

In *United States v. Stamper*, 766 F.Supp. 1396 (1991), a case parallel to the instant case, the court held that "In rape case in which physical evidence of rape was lacking, Confrontation Clause required admission of complainants prior allegations of sexual abuse and fondling by three other men pursuant to defense theory of ongoing scheme of fabrication by complainant due to remarkable similarities between present and prior allegations"

In the case at bar, the trial court implied, on record, that the alleged victim had lied about prior rape reports but

still arbitrarily refuse to permit defense counsel to test her credibility by cross-examination on this most important issue (TP. 104)

"Where courts restriction prevents counsel from cross-examining governments chief witness as to his credibility and veracity of his testimony on a required element of the charged offense, defendant is denied his Sixth Amendment right of confrontation" *U.S. v. Callahan*, 551 F.2d 733, (6th Cir. 1977).

The court further held that "The trial court may violate confrontation clause if it prevents defense from placing facts before the jury from which bias, prejudice of lack of credibility of prosecution witness may be inferred" *United States v. La Richie*, 549 F.2d 1099 (6th Cir. 1977) *See also U.S. v. Garrett*, 542 F.2d 23 (6th Cir. 1977) for a similar holding.

In the instant case, credibility was the sole issue presented to the trier of fact. To prevent the Appellant from rightfully testing the credibility of the accusing witness is clearly an abuse of discretion by the trial court, and the Sixth Circuit has so ruled. "Sustaining objections by government to attempt by defendant to discredit inculpatory testimony of a sole accusing witness by proof of bias or motive to falsify constituted an abuse of discretion, where jury did not have sufficient information on which it could make a discriminating appraisal of witness

motives or bias" *United States v. Baker*, 494 F.2d 1262, (6th Cir. 1974)

The Sixth Circuit again recognized the vital importance of a full and complete cross-examination when the Court held that the "right to cross-examination is part and parcel of confrontation, and the later is meaningless without the former; *Flower v. Ohio*, 564 F.2d 748 (6th Cir. 1977)

In the instant case, the proposed cross-examination of the alleged victim and her father concerning other rape allegations made against other men by the alleged victim, all of which were unsubstantiated, would not have been harassing, confusing nor repetitive nor would it have been a 'fishing expedition'. It would have simply given the juror's, as sole judges of fact and credibility, the information necessary, and to which they were entitled, to determine credibility and to render a fair and impartial verdict.

Although the Appellant requested the Appellate Counsel this valid and colorable claim, Appellate Counsel refused to do so, which rendered Appellate Counsel ineffective and denied Appellant a meaningful Direct Appeal. Due to the ineffectiveness of both trial counsel and appellate counsel, Appellant's judgment of conviction should be reversed and Appellant afforded a new trial with all Constitutional safeguards intact.

IN THE COURT OF APPEALS
TENTH APPELLATE DISTRICT
FRANKLIN COUNTY, OHIO

STATE OF OHIO,
Plaintiff - Appellee,

v. **No. 89AP-1037**

JERRY MCMEANS,
Defendant - Appellant.

PRO-SE APPEAL BRIEF
(to Supplement the Brief
Already Filed By Counsel)

On Appeal From The Court
of Common Pleas, Franklin
County, Ohio.

Jerry McMeans # 213-801
Warren Correctional Institute
P.O. BOX 120
Lebanon, Ohio 45036
in Propria Persona

ASSIGNMENT OF ERROR PRESENTED

1. Fourth Assignment of Error (Part 'B')

   The Appellant was denied effective assistance of counsel

2. Fifth Assignment of Error

   The Appellant was denied due process of law by the withholding and denial of exculpatory evidence and discovery materials

3. Sixth Assignment of Error

   The Appellant was denied a fair trial and due process of law by the misconduct of a police investigator who prematurely concluded that the Appellant was guilty, and thereby failed to preform scientific tests that may have yielded exculpatory evidence.

4. Seventh assignment of Error

   The cumulative effect of all previous errors denied the Appellant a fair trial and due process of law.

Note: This error is entitled Part 'B' because the Appellant's appeal Attorney had also raised ineffective assistance of counsel in the brief said attorney filed, and these additional issues raised herein are to be considered in conjunction with that argument.

FOURTH ASSIGNMENT OF ERROR (Part 'B')

THE APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL

In the appeal brief already filed by the Appellant's attorney, said attorney, as the fourth assignment of error, argued that the Appellant was denied effective assistance of counsel by defense counsel's incompetent cross-examination of the prosecutrix, and the failure to request limiting instructions on the purposes of evidence of other sexual conduct between the Appellant and the prosecutrix being considered by the jury. The Appellant totally agrees with this appellate attorney's argument, and feels his trial counsel was ineffective for the reasons stated therein. However, the Appellant further contends that there are **other** areas and instances which also show his trial counsel was ineffective, and at this time, the Appellant would like to expound upon them.

Thus in conjunction with the reasons already raised by this appellate attorney, the Appellant additionally feels he was denied effective assistance of counsel for the following reasons;

#1. The trial attorney's failure to research and prepare for trial

It has been held that the "pre-trial phase of a criminal defense is perhaps the most critical period of the proceeding", *Powel v. Alabama*, 287 U.S. 45, 53 S. Ct. (1932). "The heart of effective representation is the dependant duty to prepare and investigate", *Weidner v. Wainwright*, 708 F.2d 614. "Counsel must develop every defense law permits. This obligation is the heart of the adversary process, and it is impossible to discharge that duty without preparation and investigation", *United States v. Yelardy*, 576 F.2d 863. "Counsel . . .

the trial transcript, the judge points out such lack of preparation by saying "I will have Nancy re-read it, because obviously you didn't".

We have the same situation happening again when the Rule 29 motion was re-newed before the case went to the jury. Mr. Janes made the motion, but in spite of the court's previous warning to be prepared, he still had not done any research to support the motion. At page 257 of the trial transcript the judge said:

"I will advise you and I will tell everybody right up front, **nobody has provided any research** for the court, whatsoever, with respect to this type of case, and whether the evidence that we have is sufficient to have a finding of guilty." (Tr. 257, emp. added).

So, point blank, in the very works of the trial judge, Mr. Janes did not properly support his motion and had not adequately prepared, and as a result of the attorney's lack of research, the Appellant was certainly prejudiced, since the judge held "I am construing the evidence most favorably towards the prosecution on these things". (Tr. 257).

Thus here we have several examples where it is shown by the record that Mr. Janes did not research and properly prepare for his case. And such lack of preparation is contrary to effective representation as held in the before-cited case law (see page 1 of this brief). Further with each instance that the Appellant has shown Mr. Janes lack of research, the Appellant has also shown how it prejudiced

him (satisfying the 'prejudice' criteria of *Strickland v. Washington*, 466 U.S. 688).

#2. The jury composition.

Here in this instant case, the Appellant was charged with six counts of rape against a young girl. Yet when Mr. Janes conducted the jury selection, he allowed two jurors to be seated where, it was disclosed in voir dire, that one was the mother of a girl who had been raped, and the other juror was a father who had a daughter that had been murdered (this man also admitted he was acquainted with Franklin County Prosecutor Michael Miller). However, in spite of Mr. Janes being well aware of the possible bias of these two jurors, he did **not** challenge them for cause, **nor** did he even use any of the Appellant's **remaining** peremptory challenges to excuse them. Instead Mr. Janes freely allowed them to be seated on the jury.

Surely no competent attorney, especially in a rape case, would want a jury in which one of the jurors had a daughter who had once been raped. And even more so, then we also have man who had a daughter to a murder seated on the jury. To have a child fall victim to a violent crime is certainly a very traumatic experience, and it is quite possible that, during all of the testimony in this case, those two parents re-lived and were brought to remember the grief and pain of the violent crimes their children

suffered, and while they may not readily admit it in voir dire that it would affect their thinking or verdict, there certainly had to be a great chance of a **subconscious** bias or prejudice in their perception of the facts of this case developing. It also should be noted that the second witness the State presented was the father of the prosecutrix, and by having two jurors who were also readily identify with this man, but there was a great risk that any subjectiveness as fas as weighing the credibility of his testimony would be influenced. Based upon these danger, it is utterly incredible that Mr. Janes would not have exercised the Appellant's peremptory challenges to excuse these two jurors, and, as already stated, surely no competent attorney would desire a jury composition such as this. Mr. Janes even addressed the risk involved when he said in his closing argument, "Mrs. Hunt, we knew when you were honest in voir dire, this would be a very difficult case for you based upon your personal experience in the past". (Tr. 282). Yet knowing that danger, Mr. Janes still allowed this woman on the jury.

Nor can Mr. Janes conduct in jury selection by excused as trial strategy. In *Martin v. Rose*, 744 F. 2d 1245, the United States Court of Appeals for the Sixth Circuit held that "a criminal defendant is denied the effective assistance of counsel where his attorney pursues strategy and tactics that would be considered incomplete by a lawyer with ordinary training and skill in criminal law." And this must be the case here, as most attorneys, just upon

hearing that the man had once worked with the Franklin County Prosecutor and was acquainted with him, they would have used peremptory challenge to remove that man, yet alone to leave him seated on the jury when it came to light that he had a daughter who was violently murdered. Even worse, to also use the mother of a rape victim as a juror in a rape trail borders on absurd. In fact, because of the often inflammatory nature of rape case involving a small child, and especially in such cases as this one, where there are many legal questions concerning sufficiency of the evidence, many skilled attorneys may have elected a bench trial before a judge rather than risking the possibility of jury passion and prejudice out-weighing the evidence. Yet here, knowing full well that he had two jurors with children who had been crime victims, Mr. Janes allowed these jurors to be seated. Surely these actions of Mr. Janes were quite possible to hinder the Appellant's ability to receive a fair trial, and by his own attorneys conduct, the Appellant was left to a **great risk** of jury prejudice and bias.

#3. Failure to make proper objections.

In this case Mr. Janes many times failed to object to critical errors during the trial.

First off, the most importantly, much of Donald Self's . . .

FIFTH ASSIGNMENT OF ERROR

THE APPELLANT WAS DENIED DUE PROCESS OF LAW BY THE WITHHOLDING AND DENIAL OF EXCULPATORY EVIDENCE AND DISCOVERY MATERIALS.

In this instant case, the Appellant made a pre-trial request for 'discovery' under Criminal Rule 16 asking for, in part, any statements of witnesses, prior bad act information on witnesses,any medical reports or physical evidence, and any exculpatory evidence. However, in complying with said discovery request, the State of Ohio with- held discoverable evidence, and by such, denied Appellant a fair trial.

"Due process requires that the government not suppress evidence favorable to the accused or discrediting to its own case, and upon request, that it disclose to the defense all such information". *Brady v. Maryland*, 373 U.S. 83 (1963). "this requirement of candor by the sovereign encompasses information which bears upon the credibility of its witnesses, as well as matters more directly material to guilt or innocence". *Napue v. Illinois*, 360 U.S. 264 (1959). "Due process can be denied by failure to disclose alone". *United States v. Hiber*, 463 F. 2d 455 (1972).

Here in this instant case, it is apparent from a reading of the record, that the State of Ohio with-held discovery material.., in fact, in one instance, the trial judge himself brings the existence of such non-disclosure to light. Please see page 102 of the trail transcript in which the judge addresses the prosecutor;

(The Court): "I know your office is busy, I know you have a lot of cases. You got to realize this is a life sentence. This is probably, next to murder, the most severe case we have down here and you are treating it with an attitude you don't give a shit if it gets reversed on appeal. I mean, to come up and say, I don't know if there is any prior statements...

Mr. Shroyer: No.

The Court: Well, gee, I asked the officer just now and there may or may not be a tape. You've got to have, when you are preparing a case in front of me or anybody else in this system, you have to have researched the case. I hope you know when a Rule 16 comes up, you can here it is, yes, I know exactly what's in the file. You don't know what's in the file. Well, let me tell you, there is a lot in this file..," (Tr. 102-102, emp. added).

Continuing on transcript page 103, this exchange took place between the Court and defence attorney, wherein the Court advised the defence attorney that a rape report had been with-held from him;

Mr. Janes: You are going to fast for me, Judge. The 38 year old, is this the questions I just asked?

The Court: No. The question you asked was of July of this year and July is not accurate. It was June. There is a report in here that she charged somebody, you don't know about the other one. (Tr. 103, emp. added).

And further, at transcript page 105, where the Court again says to the attorneys;

(The Court): "First of all, this is a unique case. You have had at least 24 hours and I don't want to see a life case handled as cavalier as both of you are handling this. Somebody is getting screwed and the system is getting screwed." (Tr. 105).

Thus, by all of the above, it is obvious that all discovery materials were not turned over to the defendant/appellant, and this is a violation of law.

Further, it is not up to the State of Ohio to decide what documents would be helpful to a defendant's case, and to then with-hold Brady material by simply saying he did not think it would be relevant or helpful to the defendant's case. Yet this is what the State of Ohio has tried to do here, as can be seen by the following transcript proceedings. Here, at page 50 of the trial transcript, the prosecutor ADMITS he with-held discovery material, but tries to justify it by saying;

" The Court: Are there parts of the file that you have extricated?

Mr. Shroyer: What I have told the social worker and Mr. Janes was my understanding anything particularly pertinent to this particular situation. I understand there are psychologicals to a psychiatrist, I don't think it's necessarily pertinent to the facts surrounding this particular case. You know, I would be glad to sit down with the Court and we can, you know, pull out what hasn't been shown to Mr. Janes, see if there is any merit given to turning it over to him." (Tr. 50, emp. added).

However, as stated, a prosecution ploy is contrary to law, as medical and psychiatric background information relating to a witness, and any material which might reflect upon the motivations of a witness is discoverable under the

Brady rule (*see United States v. Ruiz*, 702 F. Supp. 1066). This proposition is further exemplified by 3A J. Wigmore, Evidence Section 940, p. 775 (Chadborn Rev. 1970), which underscores the accused's right to exact a searching cross-examination of his accusers and the legitimacy of searching out possible biases, prejudices, and ulterior motives of the witnesses ("a more particular attack on the witness credibility is effected by means of cross-examination directed toward revealing possible basses, prejudices, or ulterior motives of the witness as they relate directly to issues of personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is always relevant as discrediting the witness and affecting the weight of his testimony."), and by *United States v. Agurs*, 427 U.S. 97 (1979) which holds "the prudent prosecutor will resolve doubtful questions in favor of disclosure".

It must also be noted that while the prosecutor made the before-stated offer to go through the file with the Court and turn over to the Appellant anything of merit, this offer came after the trial was well under way, and this not only violates the law, but is contrary to the very heart and intent of the pre-trial discovery procedure.

"Disclosure by the government must be made AT SUCH A TIME as to allow the defense to use the favorable material EFFECTIVELY IN PREPARATION AND PRESENTATION of it's case, even if satisfaction of the

criterion requires pretrial disclosure". *United States v. Pollack*, 534 F. 2d 964 (1976) (emp. added). "It is essential that the prosecution disclose information as it is obtained or to allow inspection of such information". *United States v. Elmore*, 432 F. 2d 775 (1970). "Any information or evidence which the prosecution had knowledge of or access to, and which might be exculpatory in nature, must be disclosed to the defendant in A TIMELY MANNER. The same is true of any evidence which tends to mitigate the penalty or extenuate the circumstances of the crime". *Brady v. Maryland*, 373 U.S. 83 (1963) (emp. added).

Therefore, in this instant case, the Appellant was denied due process of law by the prosecutor's failure to disclose discovery materials. The Trial Court went on record to state that it found materials pertaining to the prosecutrix's other reports of rape were with-held (Tr. 103), and the prosecutor himself admitted he with-held the prosecutrix's medical and psychological reports and a large portion of the Children's Services file (Tr. 50 and 52-53). Thus the Appellant contends that these failures to disclose deprived him of a fair trial. The prosecutor, as an officer of the State, (and even in his zeal to obtain a conviction), has a duty to see that the rights of an accused defendant are not trampled, and that the rules of the Court are followed. Yet here, either through a deliberate attempt to deprive the Appellant of a fair trial, or through simply indifference and a lack of preparation, the prosecutor failed to comply with

the rules of discovery. In fact, on four occasions, the trial judge chastised the prosecutor for his outright sloppiness in preparing the State's case, and his failure to research the files and comply with the rules of discovery. These instances are contained int he transcript as follows;

(The Court): "Is this everything that was withheld?

Mr. Shroyer: No. She went through it be cause she did pull out...

The Court: What was withheld?

Mr. Shroyer: I'm not quite sure. I would have to ask her out there.

The Court: You don't know what they gave to him and what she didn't?" (Tr. 52).

* * * *

(The Court): "But what I'm saying is you have a file, and I don't know the answer to this question either, because I don't think you know the answer. I don't think anybody knows the answer because everybody is going to say, I'm going to trial." (Tr. 105)

* * * *

"The Court: What am I going to do, adjourn for three days and let him review the file or maybe just five hours? You haven't even reviewed it yet." (Tr. 105)

(The Court): "...we can't have a trial get destroyed because nobody has the answer of nobody is thinking of those questions." (Tr. 107)

But obviously then, the prosecutor's lack of preparation resulted in a deprivation of the Appellant's rights (since the State did not timely release Rule 16 evidence in it's possession). And certainly the trial judge must have thought this deficient conduct quite serious to so berate the State's attorney on record as he did.

Further, not only are we dealing with parts of the Children's Services file which was spoke of in the before-quoted transcript proceedings, but we are also dealing with statements the prosecutrix and other witnesses made to police officers during the police investigation. This is shown by the defense attorney's statements to the Court on transcript page 307;

(Mr. Janes): "... It is the defense's contention that we may not have been provided proper discovery under Rule 16, and we base testimony from the police officer that

in, as I recall the testimony, he reviewed his file, his entire police file before the jury, and there was no mention of the witness.., the victim indicating that the mother and brother were witnesses to the crime of rape.

I was provided the document, which indicated that she, the victim, told the doctor or told people at Children's Hospital when examined that she had been raped in the presence of her mother. The problem is, that statement was made two weeks and recorded two weeks after police officer in the tape recording that we played to the Court, asked her directly about her mother being present.

So what I'm suggesting is on September 16th. When the police officer made this tape, he had information from some source and I don't know where, that the mother was present during this crime. It is nowhere in the police report and it shows up, to verify that two weeks later when she makes the first statement at Children's Hospital."

"... I don't know whether there are any other statements but I cannot explain, nor can I determine, why a police officer out of the clear blue sky would talk about the mother being present unless he had some statement written or recorded"

(Tr. 307-308)

This it is apparent that these parts of the discovery request were also with-held by the prosecutor.

Further, it must be remembered the circumstances of this instant case. There was **no** physical evidence against the Appellant what-so-ever. Nor did the expert witness who testified for the Sate directly identify the Appellant as the perpetrator of these crime, but rather Dr. Coury testified that he could neither tell when the sexual conduct occurred by his examination (Tr. 195) nor who performed the sexual activity (Tr. 199). Additionally, while the State also presented Lisa Long (a Franklin County Children's Services investigator) and Gerald Roadcap (a Columbus police officer) as witnesses, they merely testified as to their respective conduct in the reporting and investigation of the rape allegations. Therefore, the entire gist of the State's case, and the **ONLY** actual evidence against the Appellant was the testimony of the prosecutrix herself. Yet in opposition, the only evidence that was offered in defense of the Appellant was his own testimony denying the acts charged. By such, this case became one in which **THE SOLE ISSUE WAS TESTING THE CREDIBILITY OF THE ACCUSED AGAINST THAT OF HIS ACCUSER.** And in light of such a credibility test, the importance of proper cross-examination cannot be stressed enough. Certainly, since there was hardly any other corroborating prosecutrix and then the State's case would have fallen. Yet **how** could the defense conduct a proper cross-

examination and attack the prosecutrix's credibility, when the information which would be used for impeachment purposes is not disclosed by the State? Thus the conduct of the prosecuting attorney was prejudicial to the Appellant, since not only was the Appellant's ability to defend himself impaired by the State's non-disclosure, but the outcome of the trial was very likely to be different had the State released such discovery documents. (Note: even once the fact became known that the State did not release all materials to the Appellant on discovery, the trial court still did not release all the materials either, but rather, said it would just preserve the file for appeal. By this, the Appellant still was forced to proceed through trial without the use of such evidence).

Wherefore, the Appellant has shown that the State with-held evidence in violation of the discovery provisions of Rule 16, and by such, under the United States Supreme Court's holding in *Brady v. Maryland* (supra), the Appellant in this instant case was denied due process of law. For these reasons, the Appellant's conviction must be reversed.

IN THE COURT OF APPEALS
TENTH APPELLATE DISTRICT
FRANKLIN COUNTY, OHIO

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	
	:	
v.	:	**Case No.89 AP-1037**
	:	**(Regular Calendar)**
JERRY MCMEANS,	:	
Defendant-Appellant.	:	

ON APPEAL FROM THE COURT OF COMMON PLEAS
FOR FRANKLIN COUNTY, OHIO

BRIEF OF APPELLANT

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SECOND ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED BY EXCLUDING EVIDENCE OF PROSECUTRIX'S PRIOR ACCUSATIONS OF RAPE AGAINST OTHERS IN VIOLATION OF APPELLANT'S RIGHT TO A FAIR TRIAL, AND TO DUE PROCESS OF LAW AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION.

During the cross examination of State witnesses, defense counsel asked the prosecutrix if she had been sexually assaulted by anyone else (Tr. 64) and asked Donald Self if he was aware that the prosecutrix had accused someone else of rape two weeks prior to trial. (Tr. 98). The assistant prosecuting attorney's objections to both questions were sustained. The basis for sustaining the question concerning prior accusation of rape against others was not stated. However, subsequent, in chambers, discussion suggests that the trial court sustained the objection on the basis of the rape shield statute and/or irrelevancy. (Tr. 101-105).

Appellant submits that the trial courts exclusion of the evidence of the prosecutrix's accusation of rape against others was reversible error.

R.C. 2907.02(D) provides, in part:

> (D) Evidence of specific instances of the victim's sexual activity, opinion evidence of the victim's sexual activity, and reputation evidence of the victim's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, or the victim's past sexual activity with the offender, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

The rape shield statute "... essentially prohibits the introduction of any extrinsic evidence pertaining to the victim's sexual activity." *State v. Williams* (1986), 21 Ohio St. 3d 33, 34. It does not prohibit the introduction of extrinsie evidence pertaining to unfounded accusations, by the prosecutrix, of rape against others. Such false accusations of rape are not a specific instance of the victim's sexual activity. *State v. Watson* (Aug. 27, 1981), Franklin App. No. 80 AP-8807, unreported; *State v.*

Nahrstedt (Oct. 26, 1984), Lake App. No. 10-066, unreported, *State v. Dean* (Dec. 3, 1987), Cuyahoga App. No. 53068, unreported; and *State v. Besco* (Jul. 28, 1983), Lawrence App. No. 1585, unreported.

Although the courts in *Watson* and *Nahrstedt*, and *Dean* held did not properly preserve the error for review, the court in *Besco* found that the exclusion of prior false accusations of rape by the prosecutrix against others was reversible error.

Although counsel has been unable to find any reported Ohio law on this issue, other states have held that exclusion of extrinsic evidence of false accusations, by a prosecutrix, of rape against others is reversible error. *Little v. State* (Ind App. 1980), 413 N.E. 2d 639; *Cox v. State* (Md. App. 1982), 443 A. 2d 607; *State v. Baron* (N.C. App. 1982), 292 S.E. 2d 741; *West v. State* (Ark. 1986), 719 S.W. 2d 684; *People v. Hurlburt* (Ca. App. 1959), 333 P. 2d 82; *State v. Cox* (Md. App. 1983), 468 A. 2d 319; *State v. Durham* (N.C. App. 1985), 327 S.E. 2d 920; and *Thomas v. State* (Texas App. 1984), 669 S.W. 2d 420. Evidence that the prosecutrix had made false accusations of rape against others is relevant to disprove the charges as well as to impeach the credibility of the prosecutrix.

The rape shield statute was not intended to protect witnesses from the disclosure of their prior falsehoods. "... [E]vidence that a prosecutrix in a sex offense case has made similar false charges against other men should be admissible

not merely to impeach the witness but as independent evidence that the offense charged was not committed..." 75 A.L.R. 2d 508, 510.

In the instant case, the trial court reviewed the Franklin County Children Services file on the prosecutrix and noted that there were two prior accusations, by the prosecutrix, of rape against other men. Although the trial court did not provide defense counsel with unlimited access to the file, the court reported that the prosecutrix had reported that she had been raped by her girlfriend's boyfriend's boyfriend in April, 1988 (Tr. 109) and by Tony Thomason (Thompson), a thirty-eight (38) year old man in June, 1988. (Tr. 110). The trial court intimated that the reports were not proved to be well founded. (Tr. 104).

The trial court refused to allow defense counsel to cross examine the prosecutrix concerning these reports. (Tr. 119). The reports are contained in the Franklin County Children Services file that was admitted into evidence. (Tr. 119-120).

Without such evidence, Appellant was powerless to defend against an indictment where the case turned solely on the fact finder weighing of his credibility against the credibility of the prosecutrix.

The trial courts exclusion of the evidence of the false accusations of rape by the prosecutrix deprived Appellant of his right to a fair trial and due process of law. Accordingly his conviction must be reversed.

App R 26

Application for reconsideration; application for reopening

(A) Application for reconsideration

Application for reconsideration of any cause or motion submitted on appeal shall be made in writing before the judgment or order of the court has been approved by the court and filed by the court with the clerk for journalization or within ten days after the announcement of the court's decision, whichever is the later. The filing of an application for reconsideration shall not extend the time for filing a notice of appeal in a court of appeals.

Parties opposing the application shall answer in writing within ten days after the filing of the application. Copies of the application, brief, and opposing briefs shall be served in the manner prescribed for the service and filing of briefs in the initial action. Oral argument of an application for reconsideration shall not be permitted except at the request of the court.

(B) Application for reopening

(1) A defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel. An application for reopening shall be filed in the court of appeals where the appeal was decided

within ninety days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time.

(2) An application for reopening shall contain all of the following:

(a) The appellate case number in which reopening is sought and the trial court case number of numbers from which the appeal was taken;

(b) A showing of good cause for untimely filing if the application is filed more than ninety days after journalization of the appellate judgment.

(c) One or more assignments of error or arguments in support of assignments of error that previously were not considered on the merits in the case by any appellate court or that were considered on an incomplete record because of appellate counsel's deficient representation;

(d) A sworn statement of the basis for the claim that appellate counsel's representation was deficient with respect to the assignments of error or arguments raised pursuant to division (B)(2)(c) of this rule and the manner in which the deficiency prejudicially affected the outcome of the appeal, which may include citations to applicable authorities and references to the record;

(e) Any parts of the record available to the applicant and all supplemental affidavits upon which the applicant relies.

(3) The applicant shall furnish an additional copy of the application to the clerk of the court of appeals who shall serve it on the attorney for the prosecution. The attorney for the prosecution, within thirty days from the filing of the application, may file and serve affidavits, parts of the record, and a memorandum of law in opposition to the application.

(4) An application for reopening and an opposing memorandum shall not exceed ten pages, exclusive of affidavits and parts of the record. Oral argument of an application for reopening shall not be permitted except at the request of the court.

(5) An application for reopening shall be granted if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal.

(6) If the court denies the application, it shall state in the entry the reasons for denial. If the court grants the application, it shall do both of the following:

(a) Appoint counsel to represent the applicant if the applicant is indigent and not currently represented;

(b) Impose conditions, if any, necessary to

preserve the status quo during pendency of the reopened appeal.

The clerk shall serve notice of journalization of the entry on the parties and, if the application is granted, on the clerk of the trial court.

(7) If the application is granted, the case shall proceed as on an initial appeal in accordance with these rules except that the court may limit its review to those assignments of error and arguments not previously considered. The time limits for preparation and transmission of the record pursuant to App.R.9 and 10 shall run from journalization of the entry granting the application. The parties shall address in their briefs the claim that representation by prior appellate counsel was deficient and that the applicant was prejudiced by that deficiency.

(8) If the court of appeals determines that an evidentiary hearing is necessary, the evidentiary hearing may be conducted by the court or referred to a referee.

(9) If the court finds that the performance of appellate counsel was deficient and the applicant was prejudiced by that deficiency, the court shall vacate its prior judgment and enter the appropriate judgment. If the court does not so find, the court shall issue an order

confirming its prior judgment.

(C) If an application for reconsideration under division (A) of this rule is filed with the court of appeals, the application shall be ruled upon within forty-five days of its filing.

T.p. 102:

THE COURT: I know that your office is busy, I know that you have a lot of cases. You have got to realize that this is a life sentence. This is probably next to murder, the most severe case we have down here, and you are treating it with an attitude that you don't give a shit if it gets reversed on appeal... you have to have researched the case. I know you have talked to the officers, I hope you know when a rule 16 comes up, you can say here it is, yes, I know exactly whats in that file. You don't know what in the file. **Well let me tell you, there is a lot in this file**..."

T.p. 103:

"...There is a report in here that she charged somebody you don't know about the other one."

T.p. 119:

THE COURT: Now Mr. Janes would also like the opportunity to cross-examine the victim on her prior rape reports she gave, for purposes of testing her credibility. And I have advised Mr. Janes that I will not permit that, but I know that he wasnted to proffer that into the record. Is that correct?

MR. JANES: Yes Your Honor. ( ).

T.p. 52:

THE COURT: "what was withheld" (from defense counsel)

PROSECUTOR: I'm not quite sure. I would have to ask her out there" (Social Worker)

THE COURT: You don't know what she gave him and what she didn't?"